

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF PUERTO RICO
3
4 In Re:) Docket No. 3:17-BK-3283 (LTS)
5)
6) PROMESA Title III
7 The Financial Oversight and)
8 Management Board for)
9 Puerto Rico,) (Jointly Administered)
10)
11 *as representative of*)
12)
13 The Commonwealth of)
14 Puerto Rico, *et al.*) November 24, 2020
15)
16 Debtors,)
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25)

12 Wanda Vazquez Garced,) Docket No. 3:20-AP-00080 (LTS)
13 *et al.*,)
14) *in 3:17-BK-3283 (LTS)*
15 Plaintiffs,)
16)
17 v.)
18)
19 The Financial Oversight and)
20 Management Board for)
21 Puerto Rico,)
22)
23)
24 Defendant.)
25)

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3 Wanda Vazquez Garced,) Docket No. 3:20-AP-00084 (LTS)
4 et al.,)
5) in 3:17-BK-3283 (LTS)
6 Plaintiffs,)
7)
8 v.)
9)
10 The Financial Oversight and)
11 Management Board for)
12 Puerto Rico,)
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14)
15 Defendant.)
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11 Wanda Vazquez Garced,) Docket No. 3:20-AP-00085 (LTS)
12 et al.,)
13) in 3:17-BK-3283 (LTS)
14 Plaintiffs,)
15)
16 v.)
17)
18 The Financial Oversight and)
19 Management Board for)
20 Puerto Rico,)
21)
22)
23 Defendant.)
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25

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19 HEARING ON MOTIONS FOR SUMMARY JUDGMENT
20 BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN
21 UNITED STATES DISTRICT COURT JUDGE
22 AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN
23 UNITED STATES DISTRICT COURT JUDGE
24
25

1 APPEARANCES:

2 ALL PARTIES APPEARING TELEPHONICALLY

3 For The Commonwealth
4 of Puerto Rico, et al.: Mr. Martin J. Bienenstock, PHV
5 Mr. Timothy W. Mungovan, PHV

6 For Governor
7 Vazquez Garced and
8 the Puerto Rico Fiscal
9 Agency and Financial
10 Advisory Authority: Mr. William J. Sushon, PHV
11 Ms. Amber L. Covucci, Esq.
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23 Proceedings recorded by stenography. Transcript produced by
24 CAT.
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| 1 | I N D E X | |
| 2 | WITNESSES: | PAGE |
| 3 | None. | |
| 4 | | |
| 5 | EXHIBITS: | |
| 6 | None. | |
| 7 | | |
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1 San Juan, Puerto Rico

2 November 24, 2020

3 At or about 10:08 AM

4 * * *

5 THE COURT: Buenos dias. This is Judge Swain
6 speaking.

7 MS. NG: Hi, Judge. It's Lisa Ng from your chambers.

8 THE COURT: I'm sorry. There was a little
9 interference there, Lisa. Could you say that again?

10 MS. NG: Hi. It's Lisa Ng from your chambers.
11 Everybody's here.

12 THE COURT: Very good. Ms. Walker, the court
13 reporter, can you hear me?

14 COURT REPORTER: Yes, Judge. Good morning.

15 THE COURT: Thank you. Good morning.

16 Ms Tacoronte, would you please call the case?

17 COURTROOM DEPUTY: Yes, Judge. Good morning.

18 THE COURT Good morning.

19 COURTROOM DEPUTY: The United States District Court
20 for the District of Puerto Rico is now in session. The
21 Honorable Laura Taylor Swain presiding. Also present, the
22 Honorable Judith Gail Dein. God save the United States of
23 America and this Honorable Court.

24 Bankruptcy Case No. 2017-3283, *In re: The Financial*
25 *Oversight and Management Board for Puerto Rico as*

1 *representative of the Commonwealth of Puerto Rico, Bankruptcy*
2 *No. 17-3283, Adversary Proceedings 20-80, 20-82, 20-83, 20-84,*
3 *and 20-85, Wanda Vazquez Garced, et al., versus the Financial*
4 *Oversight and Management Board of Puerto Rico, for hearing on*
5 *motion.*

6 THE COURT: Again, good morning and welcome, counsel,
7 parties in interest, and members of the public and press.
8 Today's hearing is for oral argument on the motions and
9 cross-motions for summary judgment in the adversary
10 proceedings that were commenced by the Governor and AAFAF
11 against the Oversight Board concerning Acts 82, 138, 176, 181,
12 and 47.

13 To ensure the orderly operation of today's telephonic
14 hearing, all parties on the line must mute their phones when
15 they are not speaking. If you are accessing these proceedings
16 on a computer, please be sure to select "mute" on both the
17 Court Solutions dashboard and your phone. When you need to
18 speak, you must unmute on both the dashboard and the phone.

19 I remind everyone that consistent with court and
20 judicial conference policies, and the orders that have been
21 issued, no recording or retransmission of the hearing is
22 permitted by any person, including but not limited to the
23 parties, members of the public, and the press. Violations of
24 this rule may be punished with sanctions.

25 I will be calling on each speaker during this

1 proceeding in the agreed order that is enumerated in the Joint
2 Informative Motion filed on November 20th, 2020, as *inter*
3 *alia*, Docket Entry No. 54 in Adversary Proceeding No. 20-80.
4 There are parallel entries in the other dockets.

5 When I do call on you, please remember to unmute
6 yourself on both the dashboard and your phone, and begin your
7 remarks by identifying yourself by name for clarity of the
8 record. If you wish to be heard out of order or otherwise
9 need to make a remark, please state your name clearly at the
10 end of an argument segment and request to be heard. Don't
11 just use the wave function on the Court Solutions dashboard.
12 I will respond to your request, and, if I deem it appropriate,
13 call on each speaker if more than one person wishes to be
14 heard and I am granting the request.

15 Please do not interrupt each other or me during the
16 hearing. If we interrupt each other, it's difficult to create
17 an accurate transcript of the proceeding. But as usual, I
18 apologize in advance for breaking this rule, because I may
19 interrupt if I have questions or you go beyond your allotted
20 time. If anyone has difficulty hearing me or another
21 participant, please say something right away.

22 The time allotments for each matter and the time
23 allocations for each speaker are set forth in the Joint
24 Informative Motion that, as I noted, has been filed in each of
25 the adversary proceedings. I encourage each speaker to keep

1 track of his or her own time. The Court will also be keeping
2 track of the time and will alert each speaker when there are
3 two minutes remaining with one buzz, and when time is up, with
4 two buzzes. And here is an example of the buzz sound.

5 (Sound played.)

6 THE COURT: If your allocation is two minutes or
7 less, you will just hear the final buzzes. If we need to take
8 a break, I will direct everyone to disconnect and dial back in
9 at a specified time. I will call a break at some point during
10 this morning's proceedings, probably around eleven o'clock,
11 depending on where we are with arguments. And we are
12 scheduled to go for three hours of argument.

13 Today's hearing will address the following motions
14 and cross-motions: First, the Oversight Board's Summary
15 Judgment Motion on All Claims and Counterclaims Related to
16 Acts 47, 82, and 81. That is Docket Entry No. 14 in Adversary
17 Proceeding No. 20-80. To the extent briefs are duplicative or
18 largely duplicative, I will just cite one filing.

19 I will also address the Governor's Summary Judgment
20 Motion, which is Docket Entry No. 12 in Adversary Proceeding
21 No. 20-82; the Oversight Board's Cross-Motion for Summary
22 Judgment, Docket Entry No. 28 in Adversary Proceeding No.
23 20-82; the Governor's Motion for Summary Judgment, Docket
24 Entry No. 13 in Adversary Proceeding No. 20-83; the Oversight
25 Board's Cross-Motion for Summary Judgment, which is Docket

1 Entry No. 29 in Adversary Proceeding No. 20-83; the Oversight
2 Board's Summary Judgment Motion on All Claims and
3 Counterclaims Related to Acts 47, 82, and 181, Docket Entry
4 No. 13 in Adversary Proceeding No. 20-84; and the Oversight
5 Board's Summary Judgment Motion on All Claims and
6 Counterclaims Relating to Acts 47, 82, and 181, Docket Entry
7 No. 12 in Adversary Proceeding No. 20-85.

8 We will begin with the government's opening for its
9 Motion for Summary Judgment on Acts 138 and 176, and
10 Opposition to Motion for Summary Judgment on Acts 82, 181, and
11 47, for a total of 60 minutes of argument. And I have down
12 that Mr. Sushon will be the first speaker for 45 minutes.

13 So, Mr. Sushon, you may begin. Mr. Sushon, I can't
14 hear you, so please unmute yourself on the dashboard and your
15 phone.

16 MR. SUSHON: Your Honor -- can you hear me now, Your
17 Honor?

18 THE COURT: Yes, I can. Good morning, Mr. Sushon.

19 MR. SUSHON: Thank you, Your Honor. Bill Sushon from
20 O'Melveny & Myers on behalf of the Governor and AAFAF.

21 With the Court's permission, I will be addressing the
22 substantive summary judgment issues, and my colleague,
23 Ms. Covucci, will address Rule 56(d) issues in opposition to
24 the Board's motions for summary judgment.

25 THE COURT: Thank you.

1 MR. SUSHON: Your Honor, we are unfortunately before
2 the Court again for a dispute between the government and the
3 Oversight Board concerning PROMESA Section 204(a). The
4 government didn't bring these cases lightly, but one thing
5 became evident through the government's correspondence with
6 the Board concerning these five laws, and that's the need for
7 guidance on what Section 204(a) means by the phrase
8 "significantly inconsistent with the fiscal plan."

9 Government employees face the task of preparing
10 204(a) certifications, and they need to determine what this
11 phrase means so that their certifications can be compliant.
12 For its part, the Board has tried to read the significantly
13 inconsistent language out of PROMESA by adopting a fiscal plan
14 provision requiring all new laws to be perfectly fiscal
15 neutral.

16 The government, on the other hand, is trying to
17 understand how much flexibility Congress afforded in adopting
18 a significantly inconsistent standard. Congress plainly
19 recognized some flexibility is required, but would never
20 have -- or it would have required perfect consistency in the
21 statute, because the Board and the government don't see eye to
22 eye on this critical question. And the Board tried
23 unilaterally to enjoin the laws without seeking court
24 intervention. The government has been forced to seek the
25 Court's guidance.

1 Now, one vein flows through all the briefing on these
2 five different laws, Your Honor, and that's the Oversight
3 Board's belief that it has no obligation, whether it's under
4 PROMESA or the Federal Rules, to provide any evidence
5 substantiating its conclusions regarding the newly enacted
6 statutes. The Board also believes that the government needs
7 not only to substantiate the government's estimate and its
8 certification under PROMESA, but also to anticipate and prove
9 to the Board's sole satisfaction that the government has
10 investigated any possibility, no matter how remote, and can
11 guarantee that each new law will not change the government's
12 expenditures by a single penny. This heads I win, tails you
13 lose reading of PROMESA, the fiscal plan, and the Federal
14 Rules is unfounded and should be rejected.

15 As for PROMESA, the Board repeatedly states that it
16 has no obligation to justify its decision to reject the
17 Section 204(a) estimate and certification. And the Board also
18 effectively takes the view that it has the sole discretion to
19 reject 204(a) certifications without having to supply any
20 evidence.

21 In essence, Your Honor, the Board is trying to grant
22 its Section 204(a) decisions the same immunity from review
23 that its certification decisions enjoy under Section 106(e),
24 but Section 106(e) on its face applies only to the Oversight
25 Board's certification determinations under this chapter. And

1 Section 204(a) doesn't empower the Board to make certification
2 determinations. Instead, it empowers the Board to send
3 notifications to the Governor, to request that the Governor or
4 direct that the Governor supply additional information, and it
5 empowers the Board to take action, if necessary, to prevent
6 the implementation of a law that violates Section 204(a). But
7 there's no certification determination by the Board under 204.

8 Now, the Court has read into Section 204 a power by
9 the Board to, "question and, if necessary, bring before the
10 Court challenges," to Section 204(a) estimates and
11 certifications. And that's Your Honor's Act 29 decision, 403
12 F. Supp. 3d. 1, at 13 to 14. But that power to question isn't
13 a certification either, and the very fact that the Board has
14 to bring those questions before the Court indicates that they
15 are, in fact, reviewable.

16 So what standard should the Court use to review the
17 Board's challenges to a Section 204(a) estimate or
18 certification? It would seem that just as this Court found
19 that Congress expected the government to comply with statutory
20 predicates in good faith, the Board should be held to the same
21 standard in exercising its power to question Section 204(a),
22 estimates and certification.

23 Alternatively, because the Board is a Puerto Rico
24 Government instrumentality, it could be required to support
25 its challenge with substantial evidence. Either way, the

1 Board should be required --

2 THE COURT: Mr. Sushon.

3 MR. SUSHON: Yes, Your Honor.

4 THE COURT: I'm sorry. May I ask you a question?

5 When you say that good faith is a standard, you say the Board
6 should be held to a good faith standard if the government is
7 to be held to a good faith standard, so what does that mean at
8 the figurative O.K. Corral? The government says, well, I said
9 it's not significantly inconsistent in good faith. The Board
10 says, we say it is significantly inconsistent in good faith.
11 What would happen then? What good would that sort of a
12 standard do?

13 MR. SUSHON: If we have a circumstance where both
14 sides in good faith say that it's significantly consistent and
15 significantly inconsistent, Your Honor, I believe, in that
16 instance, the tie has to go to the Board. If both sides are
17 operating in good faith, the Board ultimately would be the one
18 that would prevail in that situation. But that good faith
19 requires the Board to have an evidentiary basis for its
20 determinations. And in the cases that are before the Court
21 now, the Board hasn't shown any evidentiary basis for any of
22 its determinations, as we'll discuss.

23 Excuse me, Your Honor.

24 THE COURT: Has the -- I'm sorry. May I ask you a
25 question now?

1 MR. SUSHON: Of course, Your Honor.

2 THE COURT: All right. I just heard coughing or
3 something. I didn't want to disrupt you.

4 So will you discuss what evidentiary basis the
5 government has offered for its assertion that it is acting in
6 good faith?

7 MR. SUSHON: Yes, Your Honor. It varies act by act,
8 of course, because some of the acts, let's take Act 176 and
9 Act 138, those acts are fiscally neutral on their face, Your
10 Honor. And so the government has its process, which was laid
11 out in the declaration from Treasury that we submitted to the
12 Court, where they look at the face of the statute, and if they
13 determine that the statute is fiscally neutral, it's a
14 straight forward process, Your Honor.

15 Then the government simply says there's no effect on
16 expenditures, there's no effect on revenues, and because
17 there's no effect on either of those fiscal measures, then the
18 statute on its face, again, is significantly consistent with
19 the fiscal plan. Now, in those circumstances, Your Honor,
20 there can be secondary effects of a statute that's facially
21 fiscally neutral. And the government acknowledges that and
22 understands that, but the government can't be expected to
23 anticipate every possible permutation that the Board could
24 come up with.

25 If the government is able to anticipate those

1 permutations and address them, that's great; but if it can't,
2 then the Board has the power to ask the government to say,
3 okay, we see this or that secondary effect that could arise,
4 please address it. And the government should do so. But when
5 the Board is asking that question, it needs to have some sort
6 of evidence to back up the questioning. It can't just be
7 based on the Board's say-so.

8 Now, with respect to --

9 THE COURT: May I just go to, say, Act 176. If you
10 are paying people the same amount for working fewer days,
11 isn't that just by math an increase in compensation? And if
12 you're saying that, oh, don't worry, we can get all the work
13 covered even if we give our staff more days off, you're either
14 saying that you're overstaffed, or you're, at a minimum, not
15 doing anything that's productive toward head count reduction
16 and right-sizing goals.

17 So how do you say, on its face, this would have no
18 revenue impact, or no expenditure impact, I suppose, would
19 really be the point, because it goes to the cost of labor?

20 MR. SUSHON: Sure, Your Honor. Act 176 doesn't exist
21 in a vacuum. Act 176 is an amendment of Act 8-2017. And Act
22 8-2017 has the provision in it that requires that vacations be
23 planned in a way that does not interrupt the provision of
24 government services.

25 And so basically, in adopting Act 176, the government

1 is keeping constant the outputs from the government employees,
2 which is the amount of government services that will be
3 provided, and, instead, allowing the inputs to vary. But if
4 there can be a more efficient production of services by the
5 government employees, then they're allowed to take extra
6 vacation days. If they can't make up the difference in
7 productivity by being more efficient in some way, whether it's
8 adopting more efficient procedures or just, you know, working
9 harder, skipping their coffee break, whatever those employees
10 may do to make sure the work gets done, if they can't do that,
11 they can't take their vacation days.

12 So if you look at this transaction as the government
13 is procuring services at a cost, it's going to get the same
14 amount of services at the same cost, spending the same amount
15 of money. And so that is why that is a fiscally neutral law,
16 Your Honor.

17 THE COURT: Well, they'll spend the same amount of
18 money to get less labor from given individuals. So to the
19 extent you're getting a productivity boost in efficiency,
20 you're paying a bonus in time off.

21 I don't want to belabor the point, but that's -- I
22 have trouble seeing that as a fiscally neutral decision. So
23 if you can think of something that I've missed in that,
24 provide it quickly, and then I'll be quiet while you go on.

25 MR. SUSHON: Well, Your Honor, even if it were viewed

1 as not being a fiscally neutral arrangement, it's still one
2 that, even by the Oversight Board's estimate, could only
3 affect productivity at a maximum of five percent, which at
4 least for purposes of SEC quantitative materiality is
5 presumptively not material, which is certainly a secondary
6 argument.

7 But, you know, again, looking at this, if the
8 government is getting the same amount of services performed
9 for the same amount of money, at least in AAFAF's view and the
10 government's view, that is a fiscally neutral law. And I
11 understand that Your Honor may disagree with that, but
12 certainly I think it's hard to say that the government is
13 being forced to lay out more dollars, more expenditures, or
14 that it's affecting its revenues when it's spending the same
15 amount of money and getting the same amount of stuff
16 fundamentally.

17 Now, if we look at the other acts, 82, 181, and 47,
18 those are not facially fiscally neutral, Your Honor. So in
19 those cases, the government has a process that it follows, and
20 it's again laid out in the Treasury declaration, that looks at
21 a number of inputs. There's also the process that's laid out
22 in the executive order.

23 And the government goes through this process with
24 every law. It went through the process with these three laws,
25 of making these determinations, running these models, and so

1 forth, and that provides the evidentiary basis for the
2 government's estimates as to the costs of these different
3 acts. These cost estimates, as you see from the
4 certifications, are not rough approximations. They're not
5 ranges. These are things that are calculated, in some
6 instances, down to the penny. And they are all based on these
7 economic models and fiscal models that the government uses.

8 And so that's the evidentiary basis. We've laid out
9 the process that the government follows in preparing these
10 certifications.

11 THE COURT: Thank you.

12 MR. SUSHON: So the Board also tries to ignore its
13 evidentiary burdens under Rule 56, Your Honor. We all know
14 the familiar standard. Where the Board is seeking summary
15 judgment, Rule 56 requires the Board to show that there's no
16 genuine dispute of material fact, and that the Board's
17 entitled to judgment as a matter of law. Summary judgment
18 can't just be entered on the Board's say-so.

19 As the Court held in *Ortiz Gonzalez versus Velazquez*,
20 quote, a party must bring more to the table than his words,
21 conclusions and opinions. He must present facts, acts, and
22 documents. A conclusory statement unsupported by other
23 evidence is insufficient to satisfy the burden on summary
24 judgment. Were the Court to accept the self-serving
25 statement, summary judgment, brackets, for defendant, close

1 brackets, would always be granted. And that's 2018 Westlaw
2 11219614 at star three.

3 So the Board has a burden there as well. And I'd
4 like, Your Honor, to dive into each of the acts and discuss
5 them individually.

6 Looking at Act 176, as Your Honor has identified, the
7 Board challenges that this could somehow reduce employee
8 productivity. And as I've already explained, at least the
9 government and AAFAF believe that this is a fiscally neutral
10 law, because you're getting the same amount of services for
11 the same price.

12 And we've put that argument front and center from the
13 very beginning, Your Honor. It was in the certification for
14 Act 176 itself. And the Board took five months to respond to
15 that certification, and what it did -- it is well aware that
16 the government was looking at the vacation planning element of
17 Act 8-2017 as ensuring fiscal neutrality, and the Board didn't
18 even address the issue, Your Honor. Instead, it just advanced
19 its theory that Act 176 was not fiscally neutral, because it
20 affected productivity.

21 So then we file our Complaint, we file our summary
22 judgment motion, and the Board has its opportunity to respond.
23 Even then, in opposition to the motion for summary judgment,
24 the Board never addressed the effect of Act 8-2017 and its
25 vacation planning requirement. It simply ignored the issue.

1 Now, cases are legion, Your Honor, that failing to
2 refute an argument in opposition to a summary judgment motion
3 concedes the point. And we've cited those cases in our brief,
4 and that should be the end of the matter. We made our motion
5 for summary judgment. It was supported by evidence. The
6 Board didn't address it. That's that. So that should be the
7 end of it. But they waited until their reply on their
8 cross-motion for summary judgment to address this issue for
9 the first time since the law's been passed.

10 And when they did that, they still didn't address the
11 cases that hold that they have conceded the point. They
12 haven't distinguished them. They've never explained why they
13 didn't address this issue until their reply brief. So for
14 that reason alone, summary judgment should be entered for the
15 government. But as we've already discussed, Your Honor, more
16 fundamentally, the argument fails because the government,
17 under Act 176, will still be getting the same amount of
18 services for the same price.

19 The Board also has an argument that Act 8-2017's
20 vacation planning requirement doesn't apply to sick days, and
21 that's true, Your Honor. But that doesn't stop Act 8-2017's
22 vacation planning requirement from acting as a firewall,
23 because if too many employees have too many sick days and it
24 begins to interfere with productivity, then employees just
25 under Act 8-2017 won't be allowed to take their vacation days

1 | because it will interfere with the government's productivity.
2 | So the bottom line here is that the statutory scheme already
3 | addresses the concerns the Board has raised, and ensures that
4 | the government will be getting what it pays for.

5 | Now, Your Honor, I'd like to turn briefly to the
6 | Board's authority to enjoin Act 176, because it impairs or
7 | defeats PROMESA's purposes. Here, the Board has none. As the
8 | Board's letters in its brief show, the Board believes that it
9 | has the power without court intervention to enjoin acts under
10 | PROMESA Section 108. You can look at the reply brief that the
11 | Board filed on its motion, Your Honor, and it says, "here the
12 | Oversight Board advised the government of its Section
13 | 108(a)(2) determinations, including the implementing of Act
14 | 176, before satisfying Section 204(a)'s requirements that
15 | impair or defeat PROMESA's purposes, and that PROMESA enjoins
16 | the government from implementing the law."

17 | Now, they engage in this semantic exercise of saying
18 | that it's PROMESA that enjoins the government instead of the
19 | Oversight Board enjoining the government. But at the end of
20 | the day, what the Oversight Board is saying is that once it
21 | makes its determination that a law impairs or defeats
22 | PROMESA's purposes, an injunction automatically follows
23 | without the Court's intervention. And that's, of course,
24 | squarely at odds with Your Honor's decision in the Act 29
25 | litigation where you held Section 108(a), "does not itself

1 authorize the Oversight Board to nullify legislation." So for
2 this --

3 THE COURT: Can you just for a moment -- I'm sorry.
4 I'm interrupting you again. But I'd just like to look for a
5 moment at the statutory language of 108(a)(2). It says,
6 neither the Governor nor the legislature may enact, implement,
7 or enforce any statute, so on and so forth, that would impair
8 or defeat the purposes of this act as determined by the
9 Oversight Board.

10 And so while it doesn't use the language of
11 "injunction" or "stay," and doesn't talk on its face about
12 enforcement, it does seem to contemplate the triggering of
13 some sort of a bar by the fact of the determination of the
14 Oversight Board. And so perhaps, since Law 29 was in the
15 context of an action being brought by the Oversight Board to
16 enforce that determination, or with an injunction, the Law 29
17 decision is perhaps not inconsistent with the notion that
18 something happened when the Oversight Board made its
19 determination. The prohibition kicked in.

20 But then either -- if the government goes on and
21 doesn't agree that it's prohibited, the Oversight Board has to
22 cue up a plausible case before the Court, or perhaps, as has
23 happened here, the government has to cue up a case that says,
24 no, in fact, that determination was wrong, and so we're not
25 prohibited.

1 MR. SUSHON: Your Honor, I think that what you've
2 just described is precisely how the government views the
3 statutory scheme as working. The concern that the government
4 has is that in the past, the Board has contended that this
5 extrajudicial injunction is in place, and if the government
6 does anything to run afoul of the injunction, it immediately
7 faces the threat of sanctions, which would leave the
8 government in an untenable position, Your Honor, because the
9 government would never be able to question or push back on the
10 Oversight Board's determinations, except in court, without
11 being put in a position of facing a potential sanctions
12 motion. And that would chill the whole process that Congress
13 has contemplated for these issues of a back and forth between
14 the government and the Board, and a collaborative effort to
15 work through these issues first before we present them to the
16 Court.

17 So, Your Honor, as long as there's no threat of
18 immediate sanction, absent some sort of Court ordered
19 injunction that is then violated, I think that we would all be
20 on the same page. The concern here is that the Board doesn't
21 seem to take that view.

22 THE COURT: Thank you.

23 MR. SUSHON: Thank you, Your Honor.

24 Moving past that, the government's also entitled to a
25 declaration that Act 176 does not impair or defeat PROMESA's

1 purposes, both for the reasons that I've already described,
2 which is that the law is, in fact, fiscally neutral, but also
3 because the Board hasn't presented any evidence of how it
4 arrived at its determination.

5 And there has to be at least some modicum of evidence
6 that the Board has to present here, and all it's done is
7 relied on the Jaresko Declaration to say that the Board
8 determined various things. But the Board doesn't explain what
9 documents it looked at in making that determination, what
10 other evidence it may have considered, what commissions it
11 studied or what experts it consulted.

12 And the Jaresko Declaration doesn't even say that the
13 Board considered Act 8-2017's vacation planning requirement,
14 which was the primary reason that the government put forth
15 that Act 176 is fiscally neutral. If the Board didn't
16 consider that primary issue that the government raised, yet
17 reached this determination, that would be arbitrary and
18 capricious. It would not be backed by substantial evidence,
19 and it would not be an appropriate determination by the Board
20 that could supply the basis for an injunction.

21 I'd now like to turn to Act 138, Your Honor. Act 138
22 is an Any-Willing-Provider law which addresses the mass exodus
23 of health care professionals from Puerto Rico by ensuring that
24 any qualified health care professional will be admitted to a
25 health insurance company's network. As we've already

1 | discussed, this law is facially neutral. It doesn't call for
2 | the government to spend any money, and it doesn't diminish any
3 | revenues.

4 | So the government supplied a certification to these
5 | facts and said that the -- excuse me, the law is not
6 | significantly inconsistent with the fiscal plan. But the
7 | Board wasn't satisfied, and it's criticized the Act 138
8 | certification, first of all, as untimely.

9 | And I think we can dispense with that quickly, Your
10 | Honor. While the Act 138 certification did come more than
11 | seven days after the law was passed, it was before the Board
12 | sent a notification to the government that it was untimely.
13 | It was before the Board asked the government to supply a
14 | certification. The Board didn't ask for a certification until
15 | November 15th, and then set a deadline of November 22nd. So
16 | this certification was in well before that.

17 | But the Board also says that the certification is
18 | incomplete because it doesn't address two questions: First,
19 | that Act 138 somehow puts Puerto Rico's federal health care
20 | funding at risk; and, second, that Act 138 is somehow going to
21 | increase health care costs on the island, and that those costs
22 | are going to be visited on the government.

23 | Now, from the outset, the Board's main problem with
24 | the Act 138 certification was that the Board thought that the
25 | subject matters covered by Act 138 are preempted by the

1 statutory provisions of Title 42 of the U.S. Code and the
2 related code of federal regulations. They said that in their
3 November 15th, 2019, letter to the government. That's
4 Government Exhibit 27.

5 And then the Board followed up on this issue. It
6 never said anything about the law's effect on the
7 Commonwealth's expenditures, but kept asking again and again
8 for an analysis as to whether federal law conflicts with Act
9 138 such that it could jeopardize the grant of federal funds.
10 It did this in the December 18th, 2019, letter, that's
11 Government Exhibit 29; and again in letters on February 18th,
12 2020, and April 27th, 2020, and that's Government Exhibits 31
13 and 32.

14 But the Board to this day has not explained why it
15 believes that Act 138 conflicts with federal law, and it
16 doesn't explain how that could put Puerto Rico's federal
17 health care funding at issues. The Board's filed
18 counterclaims, two different declarations, and two briefs on
19 the subject, and it's acknowledged that it's done an analysis.
20 It acknowledged it both in a letter to the government and in
21 its reply brief. And the Board's never shared this analysis,
22 Your Honor.

23 The only conclusion that I can reach based on that,
24 and I believe the only conclusion that the Court should reach
25 based on that, is that the Board's analysis doesn't back up

1 its concerns, and that's why it won't share the analysis.
2 Instead, it just insists that the government has an obligation
3 to address whatever concern the Board may raise, whether it's
4 supported by evidence or not.

5 And what would happen if the government did that,
6 Your Honor? The government would unquestionably have spent
7 tens of thousands of dollars of taxpayer money working on this
8 analysis to come to the same conclusion that the Board's
9 analysis apparently reached, which is that there is no
10 conflict and there's no risk to federal funds. The government
11 shouldn't have to do that just to satisfy the Board's idle
12 speculation.

13 Now, the Board's other contention is that Act 138
14 will somehow inevitably cause the Commonwealth to pay more for
15 health care. That was really an afterthought until the
16 government filed the summary judgment motion. The Board made
17 an oblique reference to it in its November 15th letter, asking
18 the government to provide information about, "the impact on
19 the government's medical insurance plan," but without any
20 elaboration. That's in Government Exhibit 27.

21 The Board didn't say anything further on this issue
22 at all until its April 27th, 2020, letter. And even there it
23 just made a cryptic reference to "higher MCO PMPM rates."
24 That's in Government Exhibit 32. But it didn't do anything to
25 connect that issue, which frankly, at least to me, I'm not an

1 expert in this space, doesn't tell me anything about health
2 care costs. But it certainly didn't make any effort to
3 connect that to the government's having to pay additional
4 money for health care. But now, in the summary judgment
5 motion, the Board faults the government for failing to answer
6 an unasked question.

7 And in its eagerness to enjoin Act 138, the Board
8 submitted two different declarations trying to substantiate
9 its speculative theory that a law requiring managed care
10 organizations to admit more doctors into their network and
11 increase the number of health care professionals on the island
12 will somehow stifle competition, make health care more
13 expensive, and lay those expenses at the feet of the
14 government.

15 Now, I won't belabor what we've already laid out in
16 our briefs, Your Honor, but the Jaresko and the Ellis
17 Declarations that the Board has relied on are bereft of
18 evidence, bereft of analysis, conclusory and self-serving.
19 And, really, the Board has made only a minimal effort to
20 defend those declarations.

21 In terms of the Jaresko Declaration, the Board did
22 point out that the Jaresko Declaration's erroneous references
23 to Act 82 in a discussion of Act 138 were a scrivener's error,
24 but beyond that, it does nothing to try to put any more meat
25 on the bones, or explain how the Jaresko Declaration satisfies

1 the Board's evidentiary burden.

2 And the Board makes no meaningful effort to salvage
3 the Ellis Declaration either. Instead, what we have is the
4 Board complaining in a footnote that it has no obligation to
5 disprove the government's estimate. And it may be true that
6 the Board need not disprove the government's estimates, but
7 the Board has to come forward with some evidence, at least of
8 a material fact dispute as to whether the Board's
9 determinations had a substantial basis.

10 The Board also complains that the Ellis Declaration
11 is so conclusory and speculative, because the Board couldn't
12 get information it needed from the government, and that's just
13 not so, Your Honor. If the Board needs information from the
14 government, it knows full well that, under Section 104(c)(2)
15 of PROMESA, the Board has the power to get records, documents,
16 information, data, or metadata from the territorial
17 government.

18 And under Section 104(b), the Board can even give
19 that power to Dr. Ellis. If Dr. Ellis had specific things
20 that he wanted from the government, and they were in
21 furtherance of the Board's powers under the statute, then Dr.
22 Ellis could have demanded that information directly. The
23 Board never asked for it. Dr. Ellis never asked for it. So
24 the notion that the government somehow withheld information
25 from the Board and Dr. Ellis is simply baseless.

1 In addition to its efforts to defend those two
2 declarations, in its reply, the Board also brings forth three
3 new secondary sources that it says are evidence that support
4 its argument. Well, these aren't evidence, Your Honor.
5 They're not sworn testimony, and they're not even before the
6 Court as exhibits to an attorney declaration. These are just
7 articles that the Board found on Westlaw or the internet and
8 then cited in their brief. And for that reason, they should
9 be disregarded.

10 But even if they were properly before the Court, they
11 really wouldn't help the Oversight Board at all, because none
12 of these articles does what the Board thinks they do. The
13 first article, which really looks like it's an abstract of an
14 article, is by Leemore Dafny, and it comes from a website
15 called *Health Affairs*. Now, the Board says that this article
16 supports its argument that broader physician networks, those
17 that admit more doctors, are more expensive than narrower
18 physician networks. Well, the problem with that, Your Honor,
19 is that this abstract itself acknowledges that the study that
20 it describes failed to find a causal relationship between the
21 breadth of a network and prices.

22 The article says, and I quote, we could not establish
23 a causal effect of changes in breadth on premiums, nor could
24 we detect the mechanisms that generated the estimates we
25 obtained. So much for Mr. Dafny.

1 The next article is a job market paper by Soheil
2 Ghili. That article doesn't even concern Any-Willing-Provider
3 laws. Instead, it addresses something called network adequacy
4 regulations which say that managed care organizations have to
5 maintain a minimum number of hospitals in their network. So
6 it doesn't have anything to do with doctors, and it doesn't
7 have to do with requiring the admission of any willing
8 provider. Instead, it tells managed care organizations that
9 they have to have a minimum number of hospitals no matter
10 what.

11 Moreover, the article also acknowledges that its
12 study was limited. It concerned only a subsidized health
13 insurance exchange for the poor in metro Boston, an area of 30
14 miles around a central zip code in Boston. And it involves
15 only acute health -- acute care hospitals, not all hospitals,
16 and only a group of five insurance companies. The Board has
17 made no effort to explain how this article that concerns this
18 market and this statute, that are entirely different from the
19 issues presented by Act 138, has any bearing on what's before
20 the Court now.

21 Then there's the third article, Your Honor, and this
22 is the one on which the Board relies most heavily. It's a
23 piece by Paul Ginsburg entitled, "Analysis: How Any Willing
24 Provider Makes Health Care More Expensive." This 2014
25 article, it's not an academic study, and it's not even a

1 statistical analysis. It's a polemical piece prepared for and
2 at the request of America's Health Insurance Plans. It says
3 that right on the last page of the article.

4 Now, I didn't know what America's Health Insurance
5 Plans was so I did some research, and according to the New
6 York Times, America's Health Insurance Plans is a huge lobby
7 formed by the merger of two powerful insurance groups. And
8 that's a September 23rd, 2003, article in the Times entitled,
9 "Health Insurers Gain a Huge New Lobby."

10 America's Health Insurance Plans is a massive
11 organization that represents insurers' interests. For
12 example, according to the National Journal, America's Health
13 Insurance Plans gave more than a hundred million dollars to
14 the Chamber of Commerce to assist it in staking out a position
15 on the Affordable Care Act. And that's from a June 13, 2012,
16 article in the National Journal entitled, "Exclusive: AHIP
17 Gave More Than 100 Million to Chambers' Efforts to Derail
18 Health Care Reform."

19 But worst of all, Your Honor, America's Health
20 Insurance Plans has come under fire for making misleading
21 statements. For example, factcheck.org criticized one of the
22 organization's TV ads as, "a challenge to common sense," that
23 was based on no evidence. And that is a factcheck.org piece
24 on the web. The URL is
25 www.factcheck.org/politics/insurance_industry_ad_makes_fishy_

1 claim_about.HTML.

2 The bottom line here, Your Honor, is that the Board
3 is relying on a polemical piece written by a giant insurance
4 lobby to try to enjoin legislation that was passed by Puerto
5 Rico's duly enacted legislature, and that's just not
6 appropriate evidence for its summary judgment motion. So the
7 Board's evidentiary -- excuse me. The Board's effort to fill
8 the evidentiary gaps with these secondary sources should be
9 rejected.

10 Your Honor, I'd like now to turn to the acts on which
11 the Board has moved affirmatively for summary judgment. Those
12 are Acts 47, 82, and 181. Act 82 imposes regulations on
13 pharmacy benefit management programs --

14 COURT REPORTER: I'm sorry, Counsel. I can't hear --
15 Your Honor, this is the court reporter. The fire alarm has
16 started.

17 THE COURT: Is that the fire drill starting?

18 COURTROOM DEPUTY: Yes, Your Honor.

19 THE COURT: All right. Counsel, I understand that
20 there is a fire drill, and it will prevent everybody from
21 being able to hear and the court reporter from being able to
22 work. And so, unfortunately, we need to take a break right
23 now for the duration of the fire drill, which I'm told will be
24 20 minutes.

25 And so I have roughly eight minutes left in your time

1 on the clock, Mr. Sushon. I'm sorry to stop you mid sentence.
2 So everyone please log out and log back in in 20 minutes and
3 we will continue. Thank you for your cooperation.

4 MR. SUSHON: Thank you, Your Honor.

5 THE COURT: I'm signing off now.

6 (At 10:54 AM, recess taken.)

7 (At 11:21 AM, proceedings reconvened.)

8 THE COURT: Good morning again. This is Judge Swain.
9 I understand that we are all back.

10 Ms. Walker, can you confirm that you can hear us?

11 COURT REPORTER: Yes, Your Honor. Thank you.

12 THE COURT: Thank you very much.

13 So Mr. Sushon will recommence, and I'll set you with
14 eight minutes to go. You may begin.

15 MR. SUSHON: Terrific. Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. SUSHON: Bill Sushon from O'Melveny & Myers for
18 the Governor and AAFAF.

19 So we were moving into the three acts on which the
20 Board seeks summary judgment, which require the Court to
21 resolve the issue of what "significantly inconsistent with the
22 fiscal plan" means. Now, Your Honor, as I've already alluded
23 to, the Board has tried to read the significantly inconsistent
24 requirement out of Section 204(a) by putting into the fiscal
25 plan a provision that requires every new law to be perfectly

1 revenue neutral.

2 The Board has not explained in any of its briefing
3 how it has the power to amend a federal statute passed by
4 Congress through the fiscal plan. Instead, it just goes on
5 and doubles down saying that -- in its reply, that every
6 dollar is material and the law is either -- either is or is
7 not revenue neutral. It can't be partially revenue neutral.
8 And so anything that is non-revenue neutral constitutes a per
9 se significant inconsistency with the fiscal plan. Until they
10 explain how they can amend a statute, Your Honor, I don't
11 think that that is the standard.

12 Other than that, the Board makes no effort to explain
13 what significant inconsistency really means. Instead, it
14 simply focuses on the government's effort to explain what the
15 word means and disputes every aspect of it. But those
16 disputes, Your Honor, should be resolved against the Board.

17 First, the Board contends, contrary to Black's Law
18 Dictionary, that the word "significant" doesn't mean material.
19 Instead, the Board offers an alternative definition, saying
20 that the Court should read the word "significant" to mean,
21 among other things, momentous. And that's what the Board says
22 is the word's ordinary meaning that must control.

23 Well, if anything, reading "significant" to mean
24 momentous would give a lot more leeway to the government than
25 using the word "material." Merriam-Webster's online

1 dictionary defines momentous as, "having great meaning or
2 lasting effect." And according to Merriam-Webster, the
3 synonyms of momentous include the words earth shattering,
4 earth shaking, historic, monumental, and my personal favorite,
5 tectonic. So the government's argument that significant means
6 material is, if anything, far more conservative than the
7 standard that the Board says should govern what the word
8 significant means.

9 Secondly, the Board erroneously criticizes the
10 government for focusing on quantitative materiality, because
11 that ignores laws that don't have an impact on the
12 government's budget. But, Your Honor, the government has
13 never argued that significant inconsistency is a purely
14 quantitative analysis. We acknowledge -- excuse me.
15 Quantitative factors, of course, take center stage, because
16 Section 204(a) focuses primarily on the effects on the
17 government's revenues and expenditures, which are inherently
18 quantitative factors. But that doesn't mean that qualitative
19 factors don't come into play. Of course there's room for
20 that. The problem for the Board is that in their papers, they
21 haven't identified any quantitative or qualitative significant
22 inconsistency with the fiscal plan.

23 Next, the Board misrepresents the government's
24 position as advocating a five percent materiality threshold
25 based on SEC regulation. That's not what we've done, Your

1 Honor. We have pointed to that five percent threshold as one
2 measure of quantitative materiality. Now, it does happen to
3 be particularly appropriate here, because we are talking about
4 revenues and expenditures, which are the same measures that
5 are governed by the SEC in issuers' financial statements, but
6 that doesn't mean the five percent is necessarily the
7 yardstick.

8 What we have shown is that with respect to each of
9 these three laws, their effect is far less than five percent,
10 ranging from .002 percent, to a little more than .1 percent
11 for any of these laws, which are far, far less than the five
12 percent materiality threshold and not enough to be
13 significantly inconsistent. And it's worth noting that the
14 Board doesn't offer any, any materiality threshold or
15 significant threshold in its papers. It simply says five
16 percent is too much, without trying to explain what is
17 appropriate. That's of no help to the government, the Board,
18 or the Court.

19 Next, the Board contends that the government's
20 interpretation of "significantly inconsistent" would allow the
21 government to enact a number of laws, each of which has a
22 small, adverse fiscal impact, but that collectively could have
23 a cumulative effect of 50 percent or greater. The problem
24 that the Board has identified here is not with the
25 government's proposed materiality standard. The Board's

1 argument would apply no matter where you set the materiality
2 standard, Your Honor. If you set it at one percent and the
3 government passed 50 laws, then that would be a 50 percent
4 deviation. If you set it at half a percent and the government
5 passed a hundred laws, that would still be a 50 percent
6 deviation.

7 The real problem that the Board has identified is
8 that Section 204(a) isn't the right solution to this problem.
9 It doesn't address the issue of cumulative effect. But other
10 things in PROMESA do.

11 First of all, Section 204(c) prevents runaway
12 government spending by prohibiting reprogramming. Now, this
13 doesn't mean, as the Board says, that every single penny has
14 to be used exactly as it's set forth in the budget. There's
15 room here, Your Honor, to move within the same line item, for
16 example, salaries, from paying one person to paying a
17 different person.

18 For example, a government employee may leave and the
19 government may need to hire someone else to do the same job.
20 The fact that the dollars aren't going to the employee who was
21 there when the fiscal plan and the budget were created doesn't
22 mean it's a reprogram. But Section 204(c) does ensure that
23 the government can't blow a hole in the side of the budget by
24 passing a series of laws that are individually permissible,
25 but collectively have a momentous effect on the government's

1 budget.

2 In addition to Section 204(c), Your Honor, the
3 government has its powers under Section 203(d) to reduce
4 non-debt expenditures if the government spending gets out of
5 whack with the budget. The Board has the power to do that
6 after certain prerequisites are filled, but it can definitely
7 ensure that this cumulative effect problem that it's
8 identified is not going to be an issue.

9 The bottom line is that there's got to be some
10 measure of significant inconsistency here. And no matter
11 where that line is drawn, these three laws fall below it.

12 Now, I'd like to turn briefly to Act 82, and I'm just
13 going to highlight a few issues that come out of the reply
14 papers. The Board contends that Act 82's estimate and
15 certification is defective primarily because the estimate of
16 475,000 dollars is inconsistent with testimony from some
17 unnamed representative of the Puerto Rico Health Insurance
18 Administration that the law could cost 27 million dollars.

19 This is not sufficient to satisfy the evidentiary
20 standards that the Board has to meet. The Board has never
21 submitted this testimony. In our papers, we pointed that out.
22 They didn't even submit this testimony in reply. The only
23 thing that we can deduce from that is that this testimony
24 doesn't exist, because testimony is recorded and should be
25 able to be submitted.

1 And the Board hasn't even identified who the person
2 from the Puerto Rico Health Insurance Administration was who
3 supposedly gave this testimony. The only defense that the
4 Board offers to the government's arguments on this score is
5 that the testimony isn't hearsay, because the Board isn't
6 relying on it for its truth. But that's beside the point,
7 because the testimony isn't before the Court, and we have no
8 evidence that it actually exists, aside from the Board's
9 reference to its own letter on the subject.

10 (Sound played.)

11 MR. SUSHON: The Board also asserts that Act 82 is an
12 improperly --

13 THE COURT: Okay. Sum up. You can briefly sum up,
14 since you hit the two buzzes.

15 MR. SUSHON: Geez, I've hit the eight minutes
16 already, Your Honor? I apologize.

17 THE COURT: No. That was 45 minutes. The fire drill
18 came in at 37 of your 45 minutes, so I put you back on for
19 eight minutes --

20 MR. SUSHON: Yeah, I know --

21 THE COURT: -- and which you had --

22 MR. SUSHON: I apologize, Your Honor.

23 In conclusion, the government tried to work with the
24 Oversight Board within PROMESA's framework to pass badly
25 needed legislation, but the government has been met with an

1 ever shifting set of objections from the Board, coupled with
2 tactics designed to deprive the government of the flexibility
3 Congress intended to give it in PROMESA. We badly need the
4 Court's guidance on what significant inconsistency means, what
5 reprogramming is.

6 I'll now turn it over to Ms. Covucci, Your Honor.

7 THE COURT: Thank you so much, Mr. Sushon.

8 MR. SUSHON: Thank you, Your Honor.

9 THE COURT: Ms. Covucci, you may unmute now.

10 Ms. Covucci? Ms. Covucci, you have to unmute on both the
11 Court Solutions dashboard and your telephone.

12 MS. COVUCCI: Good morning, Your Honor. Can you hear
13 me now?

14 THE COURT: Yes, I can. Good morning.

15 MS. COVUCCI: Thank you, Your Honor. Sorry about
16 that. Amber Covucci of O'Melveny & Myers on behalf of AAFAF
17 and the Governor. I will be addressing our request under Rule
18 56(d) to deny the cross-motion without prejudice to let the
19 parties make complete discovery on requests the government has
20 already served.

21 First, I'd like to address the Oversight Board's
22 argument that the government has waived its right to request
23 Rule 56(d) relief by also filing an opposition on the merits
24 in the alternative. The fact that the government has
25 established that there are other grounds to deny the motion

1 | doesn't mean that it can't also make a Rule 56(d) request.

2 | The First Circuit has laid out the structure of Rule
3 | 56(d) relief in the *PHC* case, that's 762 F.3d 138, decided by
4 | the First Circuit in 2014. And the government relies on that
5 | case in its opposition, but the Board does not even address it
6 | in the reply.

7 | In that case, the plaintiff, like the government,
8 | filed a Rule 56(d) affidavit, and in the alternative, they
9 | opposed the summary judgment motion on its merits. The
10 | District Court granted the motion on the merits without
11 | acknowledging the plaintiff's Rule 56(d) request, in effect,
12 | denying the Rule 56(d) request.

13 | The First Circuit held that was an abuse of
14 | discretion, because the plaintiff met the Rule 56(d) factors,
15 | even though plaintiff also opposed the motion on its merits in
16 | the alternative. *In re PHC* is a good analogy to this case,
17 | because the government has requested Rule 56(d) relief in its
18 | opposition to the motion, and it made its substantive
19 | alternative arguments in the alternative. There's just no
20 | basis to argue that requesting Rule 56(d) relief in the
21 | alternative to substantive grounds would somehow be
22 | inappropriate.

23 | The cases the Board relies on -- first, they were all
24 | decided before *PHC*, and they can all be distinguished, because
25 | they involve non-movants who either didn't request further

1 discovery until after the summary judgment motion had already
2 been fully briefed, or even decided, or they did not meet the
3 requirements of what was then numbered as Rule 56(f) and is
4 now numbered as Rule 56(d).

5 In *C.B. Trucking*, the plaintiff never requested
6 relief under Rule 56(f) at the District Court level at all,
7 and only raised the argument on appeal. Further, that case
8 was pending in the District Court for about 21 months, but the
9 plaintiff never conducted discovery on the issues central to
10 summary judgment.

11 In *Rodriguez-Cuervos*, similarly, the plaintiff only
12 requested Rule 56(f) relief after he had already lost on
13 summary judgment. And in *Ayala-Gerena*, the appellants opposed
14 the summary judgment motion without invoking Rule 56(f) at
15 all. They did not even inform the District Court that
16 discovery was outstanding until the pretrial conference when
17 the summary judgment motion had been fully briefed.

18 In all three of those cases, the non-movant tried to
19 use Rule 56(f) as a second bite of the apple after its first
20 attempt was already complete, and that's not what the
21 government has done here.

22 The only authority the Oversight Board cites, it
23 actually states a party must choose at the outset of briefing
24 between a substantive opposition and a Rule 56(f) or 56(d)
25 request, is *Westernbank*, an unpublished magistrate judge

1 report and recommendation that is inconsistent with First
2 Circuit precedent. There, the Court's remark that non-movants
3 must choose between a substantive response and Rule 56(f) was
4 dicta, because the magistrate judge also found that the
5 non-movants didn't satisfy Rule 56(f)'s basic requirements.
6 They did not file an affidavit. They did not identify what
7 additional facts they thought that discovery would reveal.
8 And they didn't explain how that discovery would be material
9 to the motion.

10 And even that remark in dicta was based on a
11 misinterpretation of both *Rodriguez-Cuervos* and *C.B. Trucking*,
12 which, as I've just mentioned, denied 56(f) relief, because
13 those requests were made after the non-movants had already
14 lost the summary judgment motion. Five years after
15 *Westernbank*, in 2014, the First Circuit acknowledged in *PHC*
16 that parties are free to file a Rule 56(d) request and make a
17 substantive argument in the alternative, and that's exactly
18 what the government has done.

19 Moving on to the actual Rule 56(d) discussion, the
20 First Circuit, again, in *PHC*, has laid out five relevant
21 factors under Rule 56(d), which, when met, warrant a "strong
22 presumption" of relief. That's 762 F3d 138, at page 144.

23 The Oversight Board does not dispute the first two
24 factors: That the Sushon Declaration is timely, and that it
25 is authoritative. So unless the Court has questions about

1 those first two factors, I will focus on the final three
2 today, which are good cause, utility of the discovery, and
3 materiality.

4 THE COURT: You may proceed to the three.

5 MS. COVUCCI: Thank you, Your Honor.

6 The government satisfies the third factor, which is
7 that it has shown good cause for not seeking the discovery
8 earlier. The Board doesn't argue that the government's
9 discovery requests are untimely, and it doesn't cite a single
10 case with similar facts holding that the non-movant waited too
11 long to pursue discovery. The timeline here is actually much
12 quicker than cases in which courts held that Rule 56(d)
13 applicants waited too long. For example, as the First Circuit
14 held in *Rivera Almodovar* in 2013, nearly a year.

15 The two cases the Board does use as examples are
16 inapposite. In *Resolution Trust Corporation*, the First
17 Circuit found that the non-movants actually were diligent in
18 seeking discovery over a three-year period, because there, the
19 summary judgment movant was the cause of most of the delay.

20 And in *Ayala-Gerena*, where the First Circuit held the
21 non-movants had waited too long, they had 18 months in which
22 to conduct discovery, but they served their discovery requests
23 just two weeks before the cutoff date. Here, the government
24 served its discovery requests well before a discovery deadline
25 had even been set, and just two months, approximately two

1 months after the final pleadings were filed. There is just no
2 similarity to cases where non-movants waited for a year or
3 more.

4 The Board makes much of the approximately two months
5 between when the pleadings were completed and the government
6 served its discovery request, but the fact that the government
7 pays both its own legal fees and those of the Board is
8 particularly important here. Nothing about the discovery
9 timeline shows a lack of diligence. It really just shows that
10 the government is being judicious with its resources.

11 As the Sushon Declaration describes, during meet and
12 confer discussions in late July, the government explained that
13 discovery was going to be necessary before summary judgment
14 would be appropriate. But the Board said it planned to file
15 summary judgment motions in August.

16 At that point, expecting that the Board's motions
17 were about to be filed, the government decided it would be
18 most efficient to wait for those motions to sharpen the issues
19 in dispute before serving discovery requests. Of course,
20 those motions never came.

21 In the meantime, the government determined that Acts
22 138 and 176, unlike Acts 82, 181, and 47, could be decided as
23 a matter of law without discovery, and filed its summary
24 judgment motions for those two acts on September 28th, 2020.
25 As soon as the Board filed its cross-motion on October 5th,

1 the government prepared targeted discovery requests focused
2 just on the issues material to the cross-motion, and served
3 them only ten days later, on October 15th.

4 Had the government filed broad ranging discovery at
5 the very outset of the case, it would still have needed to
6 follow up with targeted discovery based on the cross-motion,
7 such as the Ellis deposition notice and discovery requests
8 regarding the Board's reliance on his testimony. The 56(d)
9 request still would have been necessary, but, meanwhile, the
10 parties would be in the midst of two rounds of discovery, with
11 the government paying for both rather than the single hours at
12 issue now.

13 The fourth and fifth factors of the Rule 56(d)
14 analysis are utility of the discovery and materiality. Those
15 factors are typically analyzed together, because together they
16 require the government to show that facts probably exist that
17 will influence the outcome of the motion, and the government
18 has done that here.

19 For purposes of the 56(d) request, the materiality
20 threshold is low, because, as the First Circuit has put it,
21 evaluating the potential significance of unknown facts is
22 "something of a metaphysical exercise." That's in *Resolution*
23 *Trust Corporation*, 22 F.3d 1198, at pages 1207 to 1208, a case
24 that the Oversight Board relies on, although it doesn't
25 discuss the materiality standard in that case.

1 For that reason, courts typically grant 56(d)
2 requests if the non-movant can identify specific facts it
3 expects to reveal in discovery and explain how those facts
4 will affect the outcome of the motion. And that's just what
5 the government has done. The government's discovery requests
6 are narrow, and they're targeted to the issues at the heart of
7 the cross-motion.

8 The government seeks responses to eight discovery
9 requests, that's including subparts, 14 interrogatories, and
10 it seeks to take two depositions. That discovery, at a high
11 level, covers the Oversight Board's internal analysis of the
12 act; the basis for the Oversight Board's determinations that
13 the act violates PROMESA Sections 204(a), 204(c), or 108(a);
14 documents or analysis supporting the Ellis Declaration, if
15 any; and the Oversight Board's process for reviewing the
16 government's 204(a) certifications for newly enacted
17 legislation.

18 Walking through just a few examples of these
19 discovery requests shows that the discovery is key to the
20 outcome of the cross-motion. For example, Request for
21 Production No. 1-A, that's Government's Exhibit 23, and
22 Interrogatory No. 1, Government's Exhibit 24, seek documents
23 and testimony concerning the Oversight Board's contention that
24 the compliance certifications do not satisfy PROMESA Section
25 204(a).

1 Mr. Sushon has just explained that the cross-motion
2 doesn't include evidence about any analysis the Board did,
3 short of reading the face of the laws, to decide that the
4 certifications for Acts 82, 181, and 47 are not formal, or
5 that those laws are significantly inconsistent with the fiscal
6 plan. For example, for Act 82, the Board argues that the
7 government's cost estimate is defective because it fails to
8 address so-called conflicts that it claimed might affect
9 federal funding. But the Board has never explained why it
10 thinks this is the case, and that argument just becomes more
11 perplexing over time because Puerto Rico's federal health care
12 funds continue to flow.

13 (Sound played.)

14 MS. COVUCCI: Similarly, RFP No. 1-B, and
15 Interrogatories 2 through 4, seek documents and testimony
16 regarding the Board's economic or financial analysis of the
17 challenged acts, if any. This is also material because, as
18 Mr. Sushon explained, the Board has not supported its
19 cross-motion with evidence that it did any analysis of the
20 three acts beyond reading them and speculating and making
21 determinations about their effects.

22 And the Oversight Board 30(b)(6) deposition, that
23 notice is Government's Exhibit 25, and the Ellis deposition,
24 Government Exhibit 26, will also certainly have an effect on
25 the outcome of the cross-motion, because beyond the face of

1 the laws, the Ellis and Jaresko Declarations are the only
2 evidence the Oversight Board cites.

3 Regarding Act 82, both declarations are careful not
4 to testify that the Oversight Board actually relied on Dr.
5 Ellis' opinion when it made its determination. Ms. Jaresko's
6 declaration, paragraph 25, states only that the Oversight
7 Board's conclusion is consistent with Dr. Ellis'.

8 If it is true, as would be revealed in discovery,
9 that the Oversight Board did not rely on Dr. Ellis' opinion at
10 the time it made its decision about Act 82, and if it did not
11 consider any other evidence either, that would likely show its
12 decision was not based on substantial evidence and was
13 arbitrary and capricious when made.

14 The Oversight Board cannot carry its summary judgment
15 burden by manufacturing an expert opinion after it has already
16 come to its decision. And regarding Acts 181 and 47, the
17 Jaresko Declaration simply recites the Oversight Board's
18 determination. But that is --

19 (Sound played.)

20 MS. COVUCCI: May I sum up briefly, Your Honor?

21 THE COURT: Yes, please.

22 MS. COVUCCI: Thank you.

23 That's just the Board's say-so, and it's simply not
24 enough to carry the Oversight Board's burden on summary
25 judgment. The Board claims it has done an independent

1 analysis of the act, but it hasn't raised it in summary
2 judgment and it won't show it to us. The government is
3 entitled to full production of the evidence underlying the
4 Board's decision, or confirmation in discovery that it doesn't
5 exist.

6 Thank you, Your Honor.

7 THE COURT: Thank you, Ms. Covucci.

8 We now turn to the Oversight Board for its response
9 to the summary judgment motion and openings on its own motions
10 for summary judgment. And the first speaker is
11 Mr. Bienenstock for 25 minutes.

12 Mr. Bienenstock, would you please unmute on the
13 dashboard and your phone?

14 MR. BIENENSTOCK: Yes, Your Honor. Good morning.

15 THE COURT: Good morning.

16 MR. BIENENSTOCK: My name is Martin Bienenstock of
17 Proskauer Rose, LLP, appearing for the Financial Oversight and
18 Management Board for Puerto Rico.

19 I wish the Court, and the Board wishes the Court and
20 all parties good health; and we hope to be able to reconvene
21 in San Juan at the earliest possible time.

22 Today the relief the Board seeks --

23 THE COURT: The Court joins those wishes and hopes.

24 MR. BIENENSTOCK: Thank you, Your Honor.

25 Today the relief the Board seeks is an order granting

1 the Board's summary judgment motions and denying the
2 government's summary judgment motions. I will be covering
3 Laws 176 and 138. And my partner, Tim Mungovan, will cover
4 Laws 47, 82, and 181, which means Mr. Mungovan will also cover
5 the 56(d) motions, so I will take less time than him.

6 Your Honor, previously, such as in the case of Law
7 29, this Court has dealt with new Commonwealth laws that, by
8 their terms, require the Commonwealth to receive less revenues
9 or pay more expenses. Today, some of the laws at issue
10 directly reduce revenues, as did Law 29, but several of the
11 laws, such as Laws 138 and 176 that I'm about to discuss,
12 impact revenue and expenses, but without the law's language
13 expressly providing for the Commonwealth to pay more expenses
14 or collect less revenues.

15 For instance, Law 176 increases the cost of labor for
16 tens of thousands of employees, but not by paying employees
17 more, rather, by paying them the same amount for less work,
18 which then requires hiring more or laying off less for a
19 smaller population, which is an out-of-pocket cost.

20 The essential issue is the government refuses to
21 recognize the obvious impact of Law 176 on expenses. In fact,
22 the government's reply brief is very candid in its first
23 paragraph. It says, "the Board does not contest, and
24 therefore concedes, that Acts 176 and 138 on their faces
25 require no additional government expenditures and do not

1 affect the government's revenues. Thus, logic and common
2 sense dictate that these acts have no fiscal effects and are
3 not significantly inconsistent with the fiscal plan."

4 In the Board's view, the government has converted
5 Section 204 into a superficial, check-the-box exercise whereby
6 if the law does not expressly require writing checks or
7 reducing revenues, the government can certify it is not
8 significantly inconsistent with the fiscal plan and the
9 Board's hands are tied. It is concerning that the government
10 would even enact these laws without first having done a
11 substantive analysis. So today, I'm here to ask the Court to
12 determine that Section 204 is a substantive exercise, not a
13 superficial one, and that Section 108(a)(2) means what it
14 says.

15 Having listened carefully to Mr. Sushon earlier, Your
16 Honor, I think, at the outset, I want to address some basic
17 points that respond to points the government is making.
18 First, it is uncontrovertible that the two compliance
19 certificates or certifications that the government provided
20 for Laws 138 and 176 are, in the case of one of them, a line,
21 and in the case of another, less than a page.

22 Section 204(a)(2) provides that -- (a)(2)(A) provides
23 that a formal estimate must be prepared by an appropriate
24 entity of the territorial government with expertise in budgets
25 and financial management of the impact, if any, that the law

1 will have on expenditures and revenues. I think we really
2 have to dissect the words to get to the heart of this, because
3 we believe the case begins and stops right there at
4 204(a)(2)(A) of PROMESA. A formal estimate prepared by
5 someone with expertise in budgets and financial management of
6 the impact that the law will have on expenditures and
7 revenues. Neither estimate remotely provides any financial
8 information, shows no financial expertise, shows no impact.

9 What those two certifications are, are they are a
10 legal-beagling by someone who decided that, because the laws
11 on their face do not require the government to write checks,
12 per se, or to receive less money, they have no impact and they
13 don't have to prepare an estimate. Well, the statute doesn't
14 say, tell us what the law says the checks have to be that are
15 going to be written. The statute asks for the impact. That
16 is substance. That requires financial expertise. And any
17 responsible government, any responsible business person
18 outside of government, would want to know the impact before
19 you go ahead and enact and implement such a law, because
20 impacts are critical.

21 And that raises another issue that is so obvious, at
22 first I was going to hesitate to say it, but it seems to me
23 that's being lost, at least on the government's arguments.
24 The statutory big picture in PROMESA, as the Court and all the
25 parties well know, is that, first, the government and the

1 Board trade fiscal plans and comments, and then a fiscal plan
2 is certified that includes a debt sustainability analysis
3 showing what can be basically offered to creditors. And then
4 there's a budget, based on the fiscal plan, the debt
5 sustainability analysis, and what the numbers allow for.

6 What we're talking about here in 204 is when the
7 government comes up with a new law after the fiscal plan is
8 certified that changes things. Well, that's no small matter,
9 because changing expenses can change debt sustainability. It
10 can change other impacts on the overall economic growth and
11 competition, et cetera.

12 And you can't talk about these things, whether
13 they're five percent or one percent. They each may be mission
14 critical. You just never know. It depends on the individual
15 facts and circumstances.

16 And I guess in tribute to both the government and the
17 Board, even though the Board has been certifying its own
18 fiscal plans, it's after going back and forth with the
19 government. And they always contain, I would say, even the
20 bulk of what the government is recommending.

21 So I know the Court only sees the disputes, but the
22 reason the Court doesn't even have more is that, for the most
23 part, the issues such as we're dealing with here, are dealt
24 with in advance and incorporated in the fiscal plan, so a
25 later change will not threaten debt sustainability analysis,

1 the budget, and other critical factors.

2 Now, we think the Court could and should rule in our
3 favor on the summary judgment motions on these two laws simply
4 because all you have to do is look at the so-called formal
5 estimate and certificate, and, clearly, it comes nowhere close
6 to doing what 204(a)(2) says has to be done. There's no
7 scintilla of evidence of any financial expertise of any kind
8 or thinking applied to impact what they did, as I mentioned a
9 moment ago, with legal-beagling. On the face of the statute,
10 it doesn't say write a check, so we can say it doesn't -- it's
11 not inconsistent with the fiscal plan.

12 On 176, we agree, the Board agrees entirely with how
13 the Court framed it earlier, but I would like to suggest that
14 there are -- in addition to 204(a)(2) being a show-stopper
15 here, there are really two bases, two other bases at least on
16 which the Court, we think, can and should decide in the
17 Board's favor.

18 First, the government's whole case rests on this Law
19 8-2017, which it says preserves the productivity. Your Honor,
20 8-2017 is Exhibit 59 of the Board for today's hearing. It's
21 quite long. I'm not going to try to quote it, but it can all
22 be read. And the Court will not find the word "productivity"
23 anywhere in the statute.

24 What it basically says, on a general reading, is
25 employees can't all take vacations the same day to leave no

1 one back at the ranch to provide services. They're not
2 supposed to be -- services are not supposed to be interrupted.
3 So they have to be planned. And if, at the end of the year,
4 an employee ends up, because of that requirement, not having
5 been able to take all the employee's vacation days, there are
6 special exceptions to other laws that kick in, which allow the
7 vacation days to either be monetized or taken in the next
8 year.

9 So we think that the government's defense to all of
10 this, this Act 8-2017, is not a defense at all because it
11 doesn't do what the government says it does. It says, you
12 have to provide as many services as you were providing before,
13 even though now we're giving you additional vacation days and
14 sick days.

15 And on that, Your Honor, I want to emphasize and
16 assure the Court, and all the parties, and the government, the
17 Board never looks at these laws and proposals from a viewpoint
18 of can we stop it. The law looks -- the Board looks at it
19 from the opposite point of view: Can we accommodate what the
20 government wants to do?

21 But to determine if we can accommodate, we have to
22 have a real analysis with a real impact. And if there's a
23 cost, and here there is a cost, we then have to set about
24 finding if there's a way to bridge that cost, to offset that
25 cost in some manner within the rest of the fiscal plan and the

1 budget. And nothing stops the government from coming back in
2 the future, but, for now, there are certificates which were
3 not what 204(a)(2) had -- requires in the first place, are
4 showstoppers. And as the Court saw from all the
5 correspondence back and forth between the government and the
6 Board, it was a stiff arm. We don't have to give you more
7 information, was basically what the government was telling us.
8 And so there was no ability to try to figure out how to make
9 this work.

10 And, you know, the other answer to the
11 government's -- to the government's case here is, as the Court
12 mentioned earlier, we're trying to right-size to a much
13 smaller population and continuing outmigration. So if they
14 have excess capacity -- I mean, the Court went through this,
15 so I'm not going to belabor it. We have to reduce that,
16 otherwise, we're not an efficient government providing
17 services at a minimum cost to the taxpayer.

18 THE COURT: And so to be a formal estimate on this
19 issue of the sort that the Board is looking for, would you
20 give me -- describe some characteristics. You said it doesn't
21 reflect financial expertise, it doesn't engage the
22 productivity issue, but, yes, are you saying there need to be
23 spreadsheets that in this case would look at, you know, how
24 many employees, how many more days, what those days would be
25 in terms of average salary, you know, accounting principles?

1 You know, what do you believe formality means in an estimate?

2 And as the government points out, it does say, the
3 statute says, estimate. It doesn't say precise costing out.
4 So what are the minimum objective characteristics of a formal
5 estimate that the Oversight Board looks for?

6 MR. BIENENSTOCK: Okay, Your Honor. And I can answer
7 that. I just want a caveat that, as the Court knows, I'm just
8 a lawyer. But I would start by saying it's not as if there is
9 a rigid list of requirements so that either side can play a
10 game of gotcha.

11 That's not what this is about. This is getting to
12 the heart of the matter. And I think -- the reason I said I
13 think I can answer that question here and now is that in this
14 case, the Board's letters, and Ms. Jaresko's declaration, give
15 the government the guts to the problem.

16 You're dealing with a five percent reduction in
17 available employee hours that translates into 2,400 employees.
18 So an example of a governmental, formal estimate would say,
19 okay, taking -- I don't know if this would be right, but, for
20 example purposes, you know, taking the number of services we
21 provided last year as a benchmark, or maybe it should be upped
22 or downed by a certain amount, here was our overcapacity, if
23 we had any, last year; here's what the fiscal plan is asking
24 for, a reduction in employee count for right-sizing. That's
25 already assumed in the fiscal plan and budget to take effect.

1 That would leave still an overcapacity that would cover the
2 required services or it would not. And if it would not, then
3 here would be the cost of not reducing -- not right-sizing by
4 the same amount, or right-sizing on a slower schedule over the
5 next X years or whatever. And here's how we think we can deal
6 with it.

7 Something that gets to the heart of the matter, Your
8 Honor. As I said, we're not playing gotcha. We're saying
9 something that makes sense, that deals with the impact, that's
10 clearly what I think any logical business person, government
11 person, anyone who's in charge of a budget and responsible,
12 who has to live within their means, would want to do that.

13 And it's just amazing that it wasn't done here. It
14 has to be done in all these cases, because you can't be an
15 efficient, responsible government if you don't do the type of
16 thing I think I just described.

17 So I hope that was responsive to what the Court was
18 asking.

19 THE COURT: Thank you.

20 MR. BIENENSTOCK: And, you know, before I get to
21 108(a)(2), I want to just say that the -- since the
22 government's so-called formal estimate provided us virtually
23 nothing, Ms. Jaresko and the Board didn't even really have to
24 go back to the government and say, hey, by the way, your
25 changes to vacation and sick day policy are a five percent

1 charge, the equivalent of 2,400 full-time employees. But she
2 did say it, and she gave them the problem that any logical
3 person would have to deal with.

4 And now it's in the government's ballpark. And it
5 has been from the get-go. Okay. So deal with it. Show us
6 how this works. Clearly, Act 8-2017 doesn't tell employees,
7 you're just not getting all the sick days -- or the vacation
8 days you want, but I won't rehash that argument.

9 Now, on 108(a)(2), we agree entirely with the Court's
10 articulation, especially the concept that the way it's
11 written, once the Board makes a determination, some type of
12 bar is triggered. I don't agree with the way Mr. Sushon
13 rearticulated it.

14 I want to mention why it's so important, that bar is
15 so important. If the Court looks at Exhibits 44 and 54 of the
16 Board for today's hearing, you'll see the government's two
17 letters telling the Board, in response to Board requests, that
18 it has already implemented Laws 138 and 176. Well, that's a
19 big problem, and that's what 108(a)(2) was supposed to
20 prevent.

21 And, again, not to ignore the obvious, 108(a)(2) is
22 in Title I. It's a power given to the Board and restrictions
23 on the government before you ever get to Title II. And it
24 covers a lot more than Section 204. It covers any purposes of
25 PROMESA as determined by the Board. And that doesn't have

1 meaning unless the government is supposed to do what the
2 statute says: Stop, don't enact, don't implement, once that
3 trigger is identified for you by the Board. And as the Court
4 said, there are no words of "injunction," no one's looking for
5 contempt, at least up until now. We've never seen that would
6 serve a purpose, but there could and should be consequences.

7 What consequences? That would be determined by Your
8 Honor based on the facts and circumstances of each
9 circumstance. But 108(a)(2) is there -- will have no
10 meaning, it's virtually written out of the statute if we take
11 the government's point of view, which is we have to go to
12 court first, and we have to initiate it, and we have to win
13 before the government is supposed to stop, because we're
14 losing what we are already losing now. They go implement, and
15 now we're behind the eight ball.

16 Now, I think I have three minutes left. I'll get to
17 Law 138 for which their formal estimate is all of a line. It
18 says there is no significant impact. Again, an issue of legal
19 beagling. And as the Oversight Board explained in the lengthy
20 colloquy that the parties had in their letters, and as
21 Ms. Jaresko's declaration shows, there's 4.2 billion that --
22 being spent on health care under the fiscal plan and budget.
23 And roughly two billion or more of that comes from the federal
24 government.

25 We've had a classic business person's concern: How

1 will the Federal Government react to the fact that you're
2 passing a law that decreases price competition, leading to a
3 likely increase in health care costs? Is that going to
4 jeopardize what you get? Any reasonable person would have
5 that concern.

6 We were not asking for a legal preemption analysis.
7 And that was originally articulated in the 204 process. As
8 things went on, the Board said, as the correspondence shows --
9 and the government should not be the one to say we were late,
10 not after the way it treats the seven-day deadline on the
11 formal estimates. But the Board --

12 (Sound played.)

13 MR. BIENENSTOCK: The Board identified its concerns
14 about a law that, you know, Mr. Sushon described as
15 Any-Willing-Provider. So as Mr. --

16 THE COURT: Mr. Bienenstock, let me ask you this: Is
17 there a particular provision in the relevant federal medical
18 funding law that you -- the Board believes conditions the
19 funding on something that is clearly violated by this
20 Any-Willing-Provider law, or is this more a political Gestalt
21 concern? What is it you're looking to them to specifically
22 analyze?

23 MR. BIENENSTOCK: Okay. So on Medicaid, we do think
24 the entire statute preempts their law. But outside of
25 Medicaid, what we were concerned with was -- Your Honor used

1 the word gestalt. It was more of since, as the government --
2 I think the Court and the creditors all know, every year we
3 bite our fingernails wondering what the government's going to
4 do for Puerto Rico on health care. And, in fact, as you know,
5 the Board is criticized by the creditors for not assuming in
6 our fiscal plans that we are going to get a certain amount of
7 money every year, because the government typically doesn't
8 commit for more than a year now. Now, it has, I think,
9 committed for two years or something of that order. And it's
10 a negotiated number.

11 So we were concerned, well, how is it going to react.
12 And we know you can't predict the future and things like that,
13 but the government has lobbyists in Washington.

14 (Sound played.)

15 MR. BIENENSTOCK: It's a well-known procedure. And
16 we can make inquiries to find out what kinds of things are the
17 people who make these decisions concerned with the most, but I
18 think more to the point, Your Honor, under 108(a)(2) and 204,
19 there's a concern about, first, running afoul of the
20 provisions in Section 204 that go to promoting competition.
21 When you say that a managed care organization can no longer
22 exclude people based on prices for services, then not only do
23 the new people coming into the network have no price control,
24 but the people in the network say, hey, if they can have
25 whatever prices they want, we want that, too.

1 Also, you have the problem that Mr. --

2 THE COURT: I'll need you just to sum up --

3 MR. BIENENSTOCK: I will.

4 THE COURT: -- because you are over --

5 MR. BIENENSTOCK: I will. These are my last
6 comments, Your Honor.

7 THE COURT: Okay.

8 MR. BIENENSTOCK: So, as Mr. Ellis said, you have --
9 there are just some health care providers that are known to
10 order unnecessary tests, have other issues. Here you can only
11 exclude a person if they've been already found guilty of some
12 fraud or something on the provider. That's not health --
13 that's not healthy, pardon the pun.

14 So we have these concerns. And the government has
15 done nothing in its formal estimate or otherwise to show why
16 we should not have those concerns. And as the Jaresko
17 Declaration shows, we have a fixed amount in the budget and
18 fiscal plan that counts on certain tax revenues.

19 Mr. Ellis says, well, if you're going to raise the
20 cost of businesses for health care because there are no more
21 price controls, then you're going to have less tax revenues.
22 So we have all these concerns, and we couldn't give them more
23 facts, because --

24 THE COURT: Okay. Thank you, Mr. Bienenstock.

25 MR. BIENENSTOCK: Okay. I'm sorry for going over,

1 Your Honor. Thank you.

2 THE COURT: Thank you.

3 All right. Next is Mr. Mungovan.

4 MR. MUNGOVAN: Good morning, Your Honor. This is Tim
5 Mungovan. Can you hear me?

6 THE COURT: Yes, I can. Good morning.

7 MR. MUNGOVAN: Good morning. May it please the
8 Court. For the record, my name is Tim Mungovan. And with the
9 Court's permission, I will address Act 47 first, followed by
10 Act 82, and then Act 181.

11 Act 47 provides --

12 THE COURT: Please proceed.

13 MR. MUNGOVAN: -- a tax cut for health care
14 professionals that will indisputably reduce revenues
15 potentially by tens of millions of dollars a year.

16 The Oversight Board is entitled to summary judgment
17 on its three counterclaims pursuant to Sections 204(a) and
18 108(a)(2) of PROMESA and on the government's claims. First,
19 the government provided a defective estimate under Section
20 204(a)(2)(A). I'll simply incorporate Mr. Bienenstock's
21 portion of the argument on what would constitute an acceptable
22 estimate for the Oversight Board, and simply point out that
23 the government Section 204(a) certification for Act 47 states
24 that it, quote, could have an estimated annual impact on
25 revenues of 25.7 million dollars. That's Hearing Exhibit

1 Three.

2 The government did not provide any data or any
3 analysis supporting its, quote, estimated annual impact.
4 Subsequently, the government revised its own estimate,
5 revealing more defects than its original estimate. The
6 revised estimate is contained within the government's letter
7 dated May 28, 2020, which is Exhibit No. 6 to the government's
8 complaint, and that's Hearing Exhibit No. 5.

9 The government's letter states --

10 THE COURT: The government's hearing exhibit or your
11 hearing exhibit?

12 MR. MUNGOVAN: I apologize, Your Honor. That's the
13 Oversight Board's Hearing Exhibit No. 5.

14 THE COURT: Thank you.

15 MR. MUNGOVAN: The government's letter states, quote,
16 the revised estimate varies from the original Section 204
17 certification, since the first estimate only took into account
18 the type of physicians not qualified in the previous laws that
19 were incorporated in Act 47.

20 The letter goes on to state that, "this last estimate
21 provides a more precise impact." The implication of this
22 revised estimate is that the first estimate was based on
23 incorrect assumptions. And the best evidence that the first
24 estimate was defective is that the government's new estimate
25 substantially increased the impact from 25.7 million dollars

1 to a high of 40 million, and overall range of 540,000 to 40
2 million.

3 The revised estimate has its own defects, and in the
4 new range of the financial impact, relates only to 2020. This
5 quote made clear in the Law 29 decision that a formal estimate
6 has to compensate the entire period within the fiscal plan.
7 The government now claims that this revised estimate is not,
8 in fact, an estimate. See the government's Response to the
9 Board's Statement of Uncontested Material Facts at page 37,
10 and that's paragraph 85. That statement is belied by the
11 government's own words in its own letter dated May 28.

12 I'll shift to my second point on Act 47. The
13 government certification that Act 47 is not significantly
14 inconsistent with the fiscal plan is wrong for two reasons.
15 First, the act on its face will decrease revenues that are
16 assumed in the fiscal plan, that -- tens of millions of
17 dollars a year with no offsetting savings. It is undisputed
18 that Act 47 reduces revenues with no offsetting savings, and
19 that's based on the government's Response to the Statement of
20 Uncontested Facts, paragraph 64.

21 Second, the Act is directly inconsistent with the
22 fiscal plan. The 2019 Fiscal Plan is attached to the
23 government's Complaint as Exhibit One, and it's also attached
24 to the Jaresko Declaration as Exhibit One. It's also Hearing
25 Exhibit 55, which is the Board's hearing exhibit.

1 Section 14.3 of the 2019 Fiscal Plan is entitled,
2 Implementation and Enforcement of Revenue Measures. And
3 Subsection 14.3.3, which appears on page 124 of the 2019
4 Fiscal Plan, is entitled, Principle of Revenue Neutrality.
5 And I would simply direct the Court to read that paragraph,
6 and request that it do so, because that paragraph bears
7 directly on this particular act in question here. The 2020
8 Fiscal Plan includes the same text as the 2019 Fiscal Plan,
9 and that's at Exhibit 2, and that's Hearing Exhibit 56. It's
10 within Section 218 of Hearing Exhibit 56.

11 Ultimately, in light of the failure of Act 47 to
12 achieve revenue neutrality through decreasing revenues,
13 without reducing spending, Act 47 is specifically and
14 significantly inconsistent with the fiscal plan.

15 The Oversight Board is also entitled to summary
16 judgment on its counterclaim under Section 108(a)(2) of
17 PROMESA. The Oversight Board determined that the
18 implementation of Act 47 impairs and defeats the purposes of
19 PROMESA, and advised the government of that fact in the
20 Board's letter dated May 21, 2020. And that Act 47 must not
21 be implemented at that time. That's Hearing Exhibit Four.

22 Despite that directive, it is undisputed that the
23 government advised the Board on June 18, 2020, that Act 47,
24 "will be fully implemented." That's Hearing Exhibit Eight.
25 The Board's determination that Act 47 impairs or defeats the

1 | purposes of PROMESA is based on substantial record evidence,
2 | and that determination was not arbitrary or capricious in any
3 | respect. The act reduces tax revenues --

4 | THE COURT: I'm sorry.

5 | MR. MUNGOVAN: Yes, Your Honor.

6 | THE COURT: It sounds like you're going on to -- I
7 | want you to enumerate what you're characterizing as
8 | substantial record evidence.

9 | MR. MUNGOVAN: I will do so, Your Honor.

10 | The act reduces tax revenues with no offsetting cost
11 | savings. In addition, as set forth above, as I just detailed,
12 | the government has not complied with Section 204(a) of
13 | PROMESA. And then the Board's determinations on these points
14 | are established in paragraphs 145 through 171 of Ms. Jaresko's
15 | declaration.

16 | As Ms. Jaresko stated in her declaration, an annual
17 | revenue loss of up to 40.1 million dollars was not anticipated
18 | in the fiscal plan. That's Jaresko, paragraph 162. As
19 | Ms. Jaresko also stated in her declaration, the Oversight
20 | Board has determined an annual revenue loss of up to 40
21 | million dollars would impair the Commonwealth's ability to
22 | obtain fiscal stability and market access. That's paragraph
23 | 163 of the Jaresko Declaration.

24 | Ms. Jaresko also stated in her declaration that the
25 | Oversight Board has further determined the revenue loss would

1 | undermine the Oversight Board's revenue projections, enlarge
2 | deficits, make it more difficult to achieve fiscal targets,
3 | and diminish funds the Commonwealth can use to promote
4 | economic growth. And that's in paragraph 164 of the Jaresko
5 | Declaration.

6 | Unless the Court has questions around Act 47 or the
7 | specific discussion on Section 108(a)(2), I would like to move
8 | on to Act 82.

9 | THE COURT: You may move on. Thank you.

10 | MR. MUNGOVAN: Thank you, Your Honor.

11 | Act 82 controls arrangements between pharmacies and
12 | pharmacy benefit managers in a manner that raises prices and
13 | diminishes price competition between pharmacies, as I will
14 | explain. Act 82 also creates a new office increasing the
15 | annual cost of government.

16 | The Oversight Board is entitled to summary judgment
17 | on its counterclaims pursuant to Sections 204(a), 204(c), and
18 | 108(a)(2) of PROMESA, and on the government's affirmative
19 | claims. I will address the Board's counterclaims in turn, but
20 | first I want to point out that there is a detailed factual
21 | history between the government and the Board with respect to
22 | this act.

23 | The factual history is located at Hearing Exhibits 11
24 | through 23. On the positive side, that history shows a
25 | significant effort by the Board to engage with the government

1 to understand the impact of Act 82, as well as the
2 government's analysis of that impact. On the negative side,
3 that history shows the government simply deflecting the
4 Board's concerns, and actually actively recharacterizing the
5 Board's concerns, and then dismissing those concerns as
6 illegitimate.

7 The Court will, of course, draw its own inferences,
8 but those communications do inform the overall analysis of
9 both the government's affirmative claims and the Board's
10 counterclaims, and, particularly, the government's repeated
11 invocation of good faith. The Board -- excuse me, the
12 Governor failed to provide a compliant formal estimate as
13 required by Section 204(a)(2)(A). The certification provides
14 no detail whatsoever, which is necessary to substantiate the
15 accuracy and plausibility of the government's estimate. The
16 certification simply states that, quote, Act 82 has an
17 approximate impact of \$475,131.47 in the Department of
18 Health's budget. And that's Hearing Exhibit 12.

19 The Board had good reason to question the accuracy of
20 that estimate in light of the public testimony of officials
21 from the Puerto Rico Health Insurance Administration that Act
22 82 will increase the Commonwealth's health plan budget by 27
23 million dollars. The Board explained this concern in its
24 first letter to the government dated December 18, 2019, which
25 is Hearing Exhibit 14. The Board is not asserting that this

1 testimony is truthful or that it is accurate. Instead, the
2 Board is simply pointing out that this testimony by the Puerto
3 Rico Health Insurance Administration raises concerns for the
4 Board as to the accuracy of the government's formal estimate
5 under 204(a).

6 THE COURT: Can you identify that testimony,
7 including where it was given and who said it, and point the
8 government to a copy of it?

9 MR. MUNGOVAN: You know, Your Honor, I can't right
10 now, no. But I do recall reading a law last night that the
11 law on its face does seem to address this testimony in the
12 preamble of the law. And it seems to reject that testimony
13 that was offered. I cannot be 100 percent certain that it's
14 the same testimony, Your Honor, but the Board raised the
15 testimony in its letter. And the government responded in its
16 letter back to the Board in response to the Board's letter. I
17 think it's dated December 18th. And the government responded,
18 I believe, later in December, and referenced the exact same
19 testimony. And then rejected it as a basis on which to
20 address the Board's concern.

21 And so I can't answer your question directly right
22 now, Your Honor. I will look into it, and we can supplement
23 the record, if the Court permits. But I do not know precisely
24 where that testimony currently is.

25 THE COURT: Thank you.

1 MR. MUNGOVAN: The second defect in the Board's
2 estimate -- excuse me, the government's estimate, the second
3 defect is with respect to the approximate impact. It does not
4 estimate the impact of the law over the five-year period,
5 which is a requirement, as the Court knows from the Law 29
6 decision.

7 And it's undisputed that the approximate impact of
8 475,000 dollars in the Act 82 certification is for fiscal year
9 2020 based on the government's Response to the Statement of
10 Material Facts. And that's paragraph 22 in the Government's
11 Response to the Statement of Uncontested Material Facts.

12 The third reason that the estimate is defective is
13 that the government does not assess whether Act 82 could
14 jeopardize the Puerto Rico Department of Health's receipt of
15 federal funds. Now, I will concede that a lot of ink has been
16 spilled on this issue, with the government repeatedly, I
17 believe, evading this issue by recharacterizing the Board's
18 request in seeking a preemption analysis.

19 The Board repeatedly clarified its position on the
20 issue with various communications with the government, and
21 those are in Hearing Exhibits 14, 16, 19, and 22. And the
22 Board has submitted substantial evidence establishing several
23 key points validating its concern as follows: The Federal
24 Government provides billions of dollars in aid to the
25 Commonwealth to ensure access to affordable health care, and

1 the fiscal plan assumes, and the Commonwealth depends upon,
2 the receipt of that aid. That evidence is set forth in the
3 Jaresko Declaration, paragraphs 12 and 47, and also in the
4 2019 Fiscal Plan at pages 26 through 38, 92 through 96, and
5 111 through 119.

6 The Governor's certification that Act 82 is not
7 significantly inconsistent with the fiscal plan is erroneous
8 for two reasons. First, the conclusion is based on a
9 defective estimate, as I just previously described, and the
10 act is not revenue neutral as required by the fiscal plan. It
11 is undisputed that the 2019 Fiscal Plan and the 2020 Fiscal
12 Plan state that laws must be revenue neutral. And that's
13 undisputed based on the Government's Response to the Statement
14 of Uncontested Facts, paragraph four.

15 The government certification acknowledges on its face
16 that the act will have an approximate impact of 450,000
17 dollars on expenditures. The act provides for no
18 corresponding increase in revenues or reduction in
19 expenditures without any offsetting savings or revenues.

20 Finally, with respect to the --

21 THE COURT: May I?

22 MR. MUNGOVAN: Yes, Your Honor.

23 THE COURT: What do you say to the government's
24 argument that, using the revenue neutrality provision as an
25 absolute benchmark or cut piece deprives "significant" of any

1 meaning at all in that the government should be able to raise
2 a little issue here, raise a little issue there, in order to
3 be a government?

4 MR. MUNGOVAN: So I would say two things with respect
5 to that, Your Honor. First of all, it is set forth in the
6 fiscal plan in order to achieve a balanced budget and balanced
7 finances and to restore the Commonwealth to fiscal
8 responsibility and access to the capital markets, which are
9 core requirements of PROMESA.

10 The Board has set forth the provision that achieves
11 those core purposes of PROMESA, fiscal responsibility and
12 access to capital markets. The fact that the government
13 believes that that provision could be used in a way, meaning
14 the neutrality could be used in a way to weed out
15 "significantly," I believe -- and we would argue in response,
16 that that's not, in fact, what is happening.

17 And, two, the Board, as a practical matter, can
18 accept, and it's specifically set forth in PROMESA later in
19 Section 204(a) that the Board can accept inconsistencies that
20 -- based on an explanation from the government that it finds
21 reasonable. And so I don't accept and the Board rejects the
22 concept that that provision in the fiscal plan somehow strips
23 out the word "significantly," because the Board has the
24 ability to accept any inconsistency, if the explanation
25 provided is reasonable.

1 And what I would say is here the Board was waiting
2 for these explanations. The Board was engaging with the
3 government on these acts. And in each case -- and the
4 government turned around and commenced litigation against the
5 Board without having effectively provided the information that
6 the Board needed in order to make the determination.

7 Ultimately, what I would say with respect to this
8 specific act, Your Honor, we're just looking at the 450,000
9 dollars that is the estimated impact on the face of the
10 certification and finding that it is insignificant, but that
11 doesn't even account for the deficiencies in the certification
12 itself.

13 THE COURT: Thank you.

14 MR. MUNGOVAN: The Oversight Board is entitled to
15 summary judgment on its counterclaim under Section 204(c) as
16 Act 82 reprograms, and necessarily reprograms in violation of
17 PROMESA Section 204(c). The act spends approximately 450,000
18 dollars, in part to establish a new administrative office.
19 This expenditure is not provided for in the 2019 Fiscal Plan
20 or the 2020 Fiscal Plan. That's set forth in the Jaresko
21 Declaration, paragraph 29.

22 The Governor's certification states that the money
23 for Act 82 will come from, quote, budgeted resources and, if
24 necessary, reprogrammed funds. Indeed, the government's
25 opposition brief at page 30 points to a series of line items

1 in the budget, which it intends to use as the source of those
2 funds. But, as Ms. Jaresko points out in her declaration,
3 this is a reprogramming from the Board's perspective. And
4 that's in the Jaresko Declaration, paragraphs 26, 27, 31, 32,
5 33, and 61.

6 The government did not submit a request for the
7 Oversight Board to approve this reprogramming, nor did the
8 Board ever give its approval. And it's undisputed that the
9 government did not identify the budgeted resources that it
10 intended to use, notwithstanding the belated statement in its
11 brief. The Government's Response to the Statement of
12 Uncontested Material Facts confirms that this is a matter that
13 is not in dispute before the Court. That's on page 40 in
14 paragraph 42.

15 The Oversight Board is entitled to summary judgment
16 on its counterclaim under Section 108(a)(2) of PROMESA. The
17 Board determined that Act 82 impairs or defeats the purposes
18 of PROMESA and informed the government of that fact. That's
19 in the Board's April 27 letter, which is Hearing Exhibit 16,
20 and in the Board's June 23, 2020, letter, which is Hearing
21 Exhibit 22.

22 The Board's determination is based on substantial
23 evidence and is not arbitrary or capricious. The act adds to
24 the cost of government. It is inconsistent with the fiscal
25 plan. It relies on reprogramming. It decreases price

1 competition, and increases the cost of health care, among
2 other things, as I will describe.

3 The Board's determinations on these points are
4 established in paragraphs 19 through 61 of Ms. Jaresko's
5 declaration. Specifically with respect to decreasing price
6 competition and increasing the health care costs of the
7 Commonwealth, the Board's determinations are consistent with
8 and substantiated by Dr. Ellis.

9 Dr. Ellis states in his declaration that Act 82 will
10 raise costs for private insurance plans and its Medicaid plans
11 by requiring pharmacy benefit managers who administer those
12 plans' drug benefits to increase their payments to pharmacies,
13 while competition among pharmacies to charge less for drugs is
14 diminished. That's Dr. Ellis' declaration in paragraphs 14
15 and 21.

16 The increases in costs for funds to benefit managers
17 will adversely affect the fiscal position of the Commonwealth
18 by increasing spending on Medicaid and reducing income tax
19 revenues. And Act 82 may also increase the costs borne by the
20 Commonwealth in provision of subsidized insurance to public
21 sector employees and their families. That's the Ellis
22 Declaration, paragraphs 15 and 22.

23 The government informed the Board that it was
24 proceeding with implementing Act 82, notwithstanding the
25 Board's directive not to do so. That's in the Board's letter

1 to the government dated June 15, 2020, which is Hearing
2 Exhibit 20, and the government's letter in response dated June
3 18, 2020.

4 I'll just finish on Act 82 with respect to the
5 evidence related to Dr. Ellis. The Board isn't arguing that
6 Dr. Ellis is right. The Board isn't arguing that, in fact,
7 the Court should find that Act 82 increases costs, at least
8 with respect to Section 108(a)(2). The Board's argument is
9 that it determined that it impairs or defeats the purposes of
10 PROMESA, because it may do those things. And the government
11 is implementing a law without having fully engaged with the
12 Board on those issues.

13 And Dr. Ellis' declaration simply confirms the
14 legitimacy of the Board's concerns, and, therefore, satisfies
15 the standards that this Court set in Law 29, that the Board's
16 actions or determinations, under 108(a)(2), are not arbitrary
17 or capricious. And they're clearly not based on the
18 substantial record evidence that the Board has submitted,
19 including in the Jaresko Declaration.

20 Unless the Court has questions concerning Act 82,
21 I'll move to Act 81 -- excuse me, 181.

22 THE COURT: You may go on.

23 MR. MUNGOVAN: Thank you, Your Honor.

24 Act 181 provides for a 1,500 dollars annual salary
25 increase to the members of the Bureau of the Fire Department.

1 The Oversight Board is entitled to summary judgment on its
2 counterclaims pursuant to Sections 204(a), 204(c) and
3 108(a)(2) of PROMESA, and on the government's affirmative
4 claims.

5 The Governor failed to provide a compliant, formal
6 estimate as required by Section 204(a)(2)(A). The Governor's
7 certification concedes that the act will increase expenditures
8 in the annual amount of 2.8 million dollars. The Board
9 doesn't dispute that cost or the accuracy of that cost, but
10 rather the government's conclusion that the act is not
11 significantly inconsistent with the fiscal plan, because it,
12 quote, is plausible that the new tax, that's in brackets, with
13 this new law, provides sufficient resources to completely fund
14 the salary increase.

15 There's no formal estimate of the impact that this
16 new tax is intended to fund, a salary increase. In its letter
17 to the government dated May 11, 2020, which is Hearing Exhibit
18 27, the Board informed the government that, quote, the
19 government's estimates of Act 181's financial impact are
20 admittedly grounded in hypothetical facts, and the Governor's
21 analysis is couched in uncertainty.

22 The Board directed the government to, one, provide a
23 complete formal estimate showing when the acts would commence
24 to be collected; explain why the government believes the
25 annual tax collections are plausible to cover the cost of the

1 salary increase; and, three, the impacts on the fiscal plan if
2 the government's projections turn out to be too optimistic.
3 The government never responded with a formal estimate, and
4 indeed conceded in September that it was unable to provide a
5 formal estimate.

6 The Governor's certification that Act 181 is
7 significantly inconsistent with the fiscal plan is erroneous
8 for two reasons. First, the act is not revenue neutral as
9 required by the fiscal plan. The act provides for an
10 unconditional salary increase that is purportedly funded by a
11 contingent revenue stream. In other words, the salary
12 increase goes into effect even if the tax collection is not
13 sufficient to cover the costs.

14 Second, the act changes the increase provided in the
15 fiscal plan from a contingent increase into an unconditional
16 increase. The 2020 Fiscal Plan provides for an increase of
17 1,500 dollars for firefighters that is conditioned on the
18 collection of special revenues. That's in the Jaresko
19 Declaration, paragraph 120, and it's in the 2020 Fiscal Plan
20 at 178. Instead of paying the increase as and when the special
21 revenue funds, i.e., the tax, are collected or the funds are
22 collected, in fact, Act 181 pays the salary increase in the
23 hope that the tax generates enough revenue to pay for the
24 increase.

25 The Oversight Board is entitled to summary judgment

1 on its counterclaims under Section 204(c), as Act 181
2 reprograms in violation of Section 204(c). The government
3 certification expressly relies on reprogramming and states, if
4 the primary sources to cover for the salary increase are
5 insufficient, Act 181 requires the Office of Management and
6 Budget to allocate resources to sustain the increase for the
7 employees. That's Hearing Exhibit 26.

8 And then it says, if an internal reprogramming of
9 budgeted resources is needed, the Department of Public Safety
10 will submit to the Oversight Board a formal request. The
11 government admits that it will seek a reprogramming to fund a
12 shortfall in the Government's Response to the Statement of
13 Uncontested Material Facts. That's in paragraphs 50 and 62 of
14 its Response to the Statement of Uncontested Material Facts.

15 The reprogramming is a concrete risk, because, as of
16 September, the government had not yet collected sufficient
17 taxes to cover the cost of an increase, but was nevertheless
18 proceeding with implementing an increase with retroactive
19 effect. In its letter dated September 8, 2020, which is
20 Hearing Exhibit 62, the government indicated that, one, the
21 three percent tax was implemented on June 26, 2020; two, less
22 than half of the anticipated tax revenue had been collected;
23 and three, the Governor -- excuse me, the Office of the
24 Commissioner of Insurance is unable to estimate future Act 181
25 collections.

1 By implementing the salary increase with retroactive
2 effect, with a clear funding shortfall and no ability to
3 estimate future Act 181 collections, the government is
4 effectuating a reprogramming with respect to Act 181.

5 Finally, the Oversight Board is entitled to summary
6 judgment on its counterclaim under Section 108(a)(2). The
7 Board determined that Act 181 impairs or defeats the purposes
8 of PROMESA and informed the government of that fact. That's
9 in the Board's May 11 letter, which is Hearing Exhibit 27.

10 The Board's determination is based on substantial
11 record evidence that is not arbitrary or capricious. The act
12 creates an unconditional raise, relies on an uncertain funding
13 mechanism that has so far fallen short, and the government
14 admits that it cannot estimate future revenues from the tax.
15 The Board's determinations on these points are established in
16 paragraphs 119 through 143 of Ms. Jaresko's declaration.

17 The government informed the Board that it was
18 proceeding with implementing Act 82, notwithstanding the
19 Board's directive not to do so. That's set forth in the
20 Board's letter to the government dated June 15, which is
21 Hearing Exhibit 30, and the government's letter dated June 18,
22 2020, which is Hearing Exhibit 31.

23 Shifting, if I could, Your Honor, just briefly, at
24 the end, in my last few minutes to the government's Rule 56 --
25 or 56(d) argument.

1 THE COURT: Yes.

2 MR. MUNGOVAN: I believe I can be brief.

3 The government has failed to show that it cannot
4 present facts essential to justify its opposition. Indeed,
5 the government responded substantively to each of the Board's
6 arguments.

7 None of the discovery that the government is seeking
8 is capable of influencing the outcome of the motion for
9 summary judgment. The question is whether the government
10 complied with PROMESA. For example, the question under 204(a)
11 is whether the government provided a plausible and accurate
12 formal estimate and a correct certification. Under 204(c),
13 the question is whether Act 82 and Act 181 improperly rely on
14 reprogramming. Under 108(a)(2), the question is not whether
15 the Board's determination is correct, but whether it is
16 arbitrary and capricious.

17 The Board provided substantial evidence for its
18 determinations with respect to each act on that point through
19 the declarations of --

20 (Sound played.)

21 MR. MUNGOVAN: -- Ms. Jaresko and Dr. Ellis. All of
22 the evidence that the Court needs to adjudicate these motions
23 is set forth in the documents presented and as part of the
24 summary judgment record.

25 As I stated earlier, the declarations of Dr. Ellis

1 and Ms. Jaresko are not proving that the law is significantly
2 inconsistent. They validate the Board's concerns under each
3 of the provisions on which the Board has brought claims. And
4 for that reason, the government's claim that it needs
5 discovery is unavailing.

6 I'll finish with the last point, which is that the
7 *PHC* case that the government cites to, and specifically with
8 respect to counsel's reliance on it in oral argument today --
9 I would simply direct the Court respectfully to the *PHC* case,
10 as I believe that it is a long way from the facts in this case
11 and the circumstances in this case. But regardless,
12 ultimately, the core point under 56(d) is that the government
13 does not need discovery in order to prove an essential aspect
14 of its case.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Mungovan.

17 We will now return to the government's counsel for
18 rebuttal, beginning with Mr. Sushon for 25 minutes.

19 MR. SUSHON: Yes. Thank you, Your Honor. Bill
20 Sushon from O'Melveny & Myers for AAFAF and the Governor.

21 Your Honor, one thing that we still haven't heard
22 from the Oversight Board is any effort to describe what
23 significant inconsistency actually means. And another thing
24 that we haven't heard from the Oversight Board, Your Honor, is
25 what justification it has for adopting a fiscal neutrality

1 requirement in a fiscal plan that somehow trumps Section
2 204(a).

3 Now, Mr. Mungovan said that that's not actually what
4 the Board is trying to do, and it's not what the Board is
5 doing here with respect to these laws. But the Board in its
6 Reply Brief on its Motion for Summary Judgment on Acts 47, 82,
7 and 181 said, and I quote, "every dollar is material." That's
8 their reply at 13. And again, "A law either is or is not
9 revenue neutral; it cannot be partially revenue neutral, and
10 thus, non-revenue neutrality constitutes a per se significant
11 inconsistency."

12 So while Mr. Mungovan may say that that's not what
13 the Board is trying to do, his reply brief says otherwise.
14 And that's not what Congress intended when it adopted PROMESA.

15 Now, I'd like to turn briefly, Your Honor, to Act
16 176, the vacation statute. And one issue that arises with
17 that is the Board has focused on the notion that there will be
18 greater expenses incurred by virtue of Act 176. Now, we
19 dispute that that's the case, Your Honor, but regardless,
20 Section 204(a) doesn't talk about expenses. It talks about
21 expenditures. And those are two different things.

22 Merriam-Webster's dictionary defines an expenditure
23 as a payment made in the course of achieving a result. And as
24 I've already argued to the Court, Your Honor, Act 176 doesn't
25 result in any additional payment being made. The payments

1 being made stay the same under Act 176.

2 An expense, on the other hand, is defined by
3 Merriam-Webster as a financial burden or outlay. And while
4 there may be an argument to be had as to whether Act 176
5 creates an additional financial burden, there is no argument
6 that it requires actually making any more payments to
7 employees.

8 So the Act 176 argument, I think, if Mr. Bienenstock
9 is to be held to his word, that we should look at the words
10 that are in Section 204(a). The Board's argument that Act 176
11 results in some sort of expenditures that aren't accounted for
12 just isn't correct.

13 Now, Mr. Bienenstock also criticized the government
14 for engaging in a check-the-box exercise with respect to
15 these -- with respect to these certifications. But he hasn't
16 acknowledged, and no one on the Board's side has acknowledged,
17 Your Honor, the procedures that the government has put in
18 place to create these certifications.

19 This is not a check-the-box exercise. These are
20 estimates that are calculated down to the penny, where it's
21 appropriate under a process that's been established through
22 executive orders from the government, and under a process
23 that's described at length in the declaration from Treasury
24 that we submitted to the Court. And so this is not just a
25 check-the-box exercise. This is the government trying its

1 best to provide an estimate of the expenditure and revenue
2 impacts of these new laws.

3 When Mr. Bienenstock was asked what would be required
4 to make this not a check-the-box exercise in his view, he
5 really couldn't describe what the Board was looking for. And
6 that's part of the problem that we face here, Your Honor. The
7 government is trying to do what it needs to do under the
8 statute, and it's trying to cooperate and it's trying to
9 comply. But it's being met with constant shifting demands
10 from the Board as to what the Board thinks needs to be in one
11 of these certifications to pass muster. And when the
12 government tries to push back and say that something isn't
13 actually required, for example, because Act 8-2017's vacation
14 planning requirements obviate the need to conduct a
15 productivity analysis, the Board just insists that it's
16 correct and the government is wrong, and that's the end of the
17 story.

18 And this is why the Board's challenges to these
19 certifications need to be backed up by evidence. And while
20 we've heard Mr. Mungovan talk about the evidence, the
21 substantial record evidence that supports the Board's
22 determinations, again, all we're referred to are the face of
23 the law itself, the certification itself, and Ms. Jaresko's
24 conclusory declaration as to what the Board determined, rather
25 than what evidence the Board considered, what process the

1 Board followed, what experts the Board relied on, and so
2 forth.

3 So we need to have some sort of real guidance here as
4 to the way this process should work, and it seems that the
5 appropriate way to do that is to hold the Board to a
6 requirement that it have some evidence for its determinations
7 and some evidence for its questions for the government. But
8 here we have none. Excuse me, Your Honor.

9 As to Mr. Bienenstock's point that the government's
10 position on Section 108(a)(2) would write it out of the
11 statute, that's simply not the case, Your Honor. We
12 understand what Section 108(a)(2) provides, and we understand
13 that it gives the Board substantial leverage with respect to
14 new laws.

15 And so the government is making its effort to comply,
16 but it cannot do so if it's under the threat of sanction for
17 failing to abide by an injunction that the Board makes without
18 any substantial evidence, which is really what is happening
19 here, Your Honor. And if the Board is concerned --

20 THE COURT: Do you --

21 MR. SUSHON: I'm sorry.

22 THE COURT: Let me ask you a question.

23 (At 12:59 PM, the connection in the U.S. District
24 Court in San Juan was interrupted.)

25 (At 1:02 PM, the connection was re-established.)

1 MS. NG: Yes. It seems everybody got disconnected.
2 Let me redo everything.

3 THE COURT: Okay. So should --

4 MS. NG: Amy?

5 COURT REPORTER: Yes, Lisa. I'm here.

6 I'm sorry, Your Honor. The call dropped. Do you
7 want me to read back the last thing I heard?

8 THE COURT: Okay. Well, you don't have control over
9 that particular part of technology. Let's just make sure that
10 we still have on everybody we're supposed to have on.

11 Mr. Sushon, are you still there?

12 MR. SUSHON: Yes, I'm still here, Your Honor.

13 THE COURT: All right. And, Lisa, is the AT&T line
14 still connected?

15 MS. NG: Eric, if you can hear me, just text me.

16 Yes, he can hear.

17 THE COURT: Okay. Great. So, Ms. Walker, would you
18 explain what you got before you dropped off?

19 COURT REPORTER: Yes, Your Honor.

20 (Whereupon the reporter read back into the record
21 from page 91, line 14, to page 91, line 18.)

22 THE COURT: All right. Mr. Sushon, I believe I had
23 asked you as a follow-up to that whether the government
24 understands that it may be operating at its own risk, because
25 if it doesn't comply, the Board can seek relief, appropriate

1 relief from the Court.

2 MR. SUSHON: Yes, Your Honor. I recall the question.
3 And in some respects, I feel like John Belushi's character in
4 *Animal House*. I was rolling. So I can't remember exactly
5 what I said, but --

6 THE COURT: This is --

7 MR. SUSHON: But what I do recall in particular, Your
8 Honor, was saying that of course the Board has the power to go
9 to the Court for injunction under Section 108(a)(2). And
10 Section 204(a)(5) also provides -- not 204(a)(5), but 204(a)
11 provides the Board with the power to seek other remedies to
12 ensure that a statute that's significantly inconsistent with
13 the fiscal plan doesn't have an adverse effect.

14 And so the Commonwealth, the government recognizes
15 that risk, Your Honor, but what it can't have is the Board
16 going forward and putting the government on its heels, and
17 stopping the government from pursuing statutes without some
18 evidentiary basis, Your Honor. And so that's one issue.

19 And then I was about to turn, I now recall, Your
20 Honor, to Mr. Bienenstock's argument that 108(a)(2) will be
21 rendered a dead letter, because the government can just go
22 ahead and implement statutes until the Board can get to the
23 Court and get the Court's intervention, and that can take a
24 long time.

25 Well, aside from the threat that Your Honor has

1 already identified, which is that there may, in fact, be other
2 remedies that the Board could seek, there's also the fact that
3 courts are used to moving quickly. And while I wouldn't
4 suggest that the parties should be before Your Honor on every
5 single statute and every single little dispute, the fact of
6 the matter is the Board can go and get a temporary restraining
7 order. It can get an injunction. It can get other
8 provisional remedies that are necessary to preserve the status
9 quo if, in fact, it feels that the government's proceeding
10 with implementing a new statute is such a serious threat. So
11 108(a)(2) is hardly a dead letter, Your Honor.

12 Turning to Act 138, Mr. Bienenstock described the
13 concern about the federal funding for Puerto Rico's health
14 care as being a classic business person's concern, Your Honor.
15 And, of course, Mr. Mungovan said that the Board's concern
16 wasn't with any kind of -- excuse me -- legal issues or
17 preemption. But Mr. Bienenstock, during the course of his
18 argument, if -- I believe I heard him right, described the
19 Board's concern that the entire Medicaid Statute preempts
20 Puerto Rico's law.

21 Now, that's different from what the Board has been
22 saying in its papers. It's the first time we've heard any
23 real explanation as to what the Board thought that it was
24 getting at with this issue. I don't think that it's correct
25 as a legal matter, Your Honor, but if it were, if, in fact,

1 Act 138 were preempted by the Medicaid Statute, then the
2 solution is easy, Your Honor, because Act 138 would be
3 rendered a nullity. And there would be no problem with it
4 being significantly inconsistent with the fiscal plan.

5 So that is really --

6 THE COURT: Wouldn't there still be a practical
7 problem if, in fact, Act 138 were implemented and you went
8 forward under it before such a determination is made; and,
9 indeed, you have higher cost people coming in who may raise a
10 benchmark; and controlling that may well not be the easiest
11 thing in the world, so that extra money will have been spent
12 before somebody, maybe me, determines that Act 138 is
13 preempted, and that money shouldn't have been spent at all?

14 MR. SUSHON: Well, Your Honor, first of all, the
15 effects that are being described here on the government's
16 coffers, if they even existed, are so indirect that the amount
17 of time that it would take for them to come home to roost
18 would be much more time than it would take for the Court to
19 determine this issue, especially if it were to do so on an
20 expedited basis. But more fundamentally, Your Honor, there's
21 still no evidence before the Court that Act 138 would have
22 that effect. All we have are conclusory statements from the
23 Board's hired expert after the fact.

24 They don't say that he actually advised the Board on
25 this stuff when they were thinking about it. But even if you

1 assume that he were, all you have are his conclusory
2 statements that this is going to increase health care costs,
3 and that those costs are going to be visited on the
4 Commonwealth. There's no real analysis here, and his
5 statements are all hypothetical and conjectural. It's
6 something may happen, or that it could happen, or that it's
7 very likely that something may happen, but that's not evidence
8 that these things will happen.

9 And we've even heard the Board say that they don't
10 need to show that what Mr. Ellis is saying is actually true.
11 They just believe that what Mr. Ellis is saying, it -- even
12 after the fact, as part of this lawyer orchestrated theater
13 that the Board has put together, is somehow enough to justify
14 the Board's decisions. So the concern is really not supported
15 by any evidence, Your Honor.

16 Now -- I apologize, Your Honor. So I'd like to turn
17 briefly to Act 47, which I didn't have the opportunity to
18 address in my opening remarks, and I apologize. Time flies
19 when you're having fun. So I've used more than my allotted
20 time.

21 Candidly, the government recognizes that Act 47's
22 expected expenditure of 25 million dollars per year, even in
23 the context of a multibillion dollar fiscal plan, is a large
24 sum of money. Now, as we did show in our brief, Your Honor,
25 the overall fiscal effect still amounts to only .5 percent,

1 and it doesn't truly significantly deviate from the fiscal
2 plan.

3 But I will also say, Your Honor, that the Governor
4 only signed Act 47 and certified that it was not significantly
5 inconsistent with the fiscal plan after receiving assurances
6 from the Oversight Board's municipal affairs and legislative
7 review director that the Board had no issue with Act 47. And
8 the Board doesn't dispute this.

9 Now, the Board argues in a footnote in its brief that
10 the government can't rely on statements from Oversight Board
11 officials. And whether that's correct or not as a technical
12 matter with PROMESA, the fact that the Board is willing to
13 disavow its agents' statements undermines the Board's working
14 relationship with the government and the trust that is
15 essential to PROMESA's power sharing arrangement.

16 Now, with respect to the other concerns the Board has
17 raised with the Act 47 certification, they're without merit.
18 First, the Board insists that the government has to compute
19 the worst case when preparing a Section 204(a) certification,
20 and that should be the benchmark that's used to determine
21 whether a statute is significantly inconsistent with the
22 fiscal plan. But that's not what PROMESA says.

23 PROMESA says that the government must prepare a
24 formal estimate. And the Court has held that that estimate
25 has to be in good faith. And we understand that, Your Honor,

1 and our understanding is that a good faith estimate should be
2 the best estimate, the one that the government believes is the
3 most likely result of the law, not the worst thing that could
4 happen in a doomsday scenario.

5 If that were what Congress wanted the government to
6 do, it could have done so very easily in Section 204(a). It
7 could have said the government must prepare a worst case
8 scenario analysis of the new statute. Congress didn't say
9 that.

10 Now, the Board also contends that there was a paucity
11 of economic analysis supporting the estimate for Act 47, but
12 as we've shown in our papers, Your Honor, the certification
13 laid out all the factors that could affect the estimate. And
14 after that, the government engaged in a back and forth with
15 the Oversight Board as to the factors that affect the
16 estimate. Let's find the estimate -- and the government gave
17 the Board additional information so that the parties could
18 have a discussion about the estimate.

19 Now, you know, and that was met with the Board saying
20 that the government ignored the Board's request and didn't
21 respond to the request, and that's just not true. The
22 government did its best to work with the Board on this issue.
23 And it's certainly not the case, as the Board has argued, that
24 submitting a new range of estimates at the Board's request
25 somehow concedes that the original estimate was wrong or

1 without basis or inexact.

2 When the government gave the Board the full range of
3 estimates, first of all, it wasn't in a certification, but
4 setting that aside, that range was from 500,000 dollars to 40
5 million dollars. The 25 million dollars a year estimate that
6 the government provided in the first place falls within the
7 midpoint of that range. Frankly, above the midpoint of that
8 range. And so that range only confirms that that 25 million
9 dollars per year estimate was on target.

10 In sum, Your Honor, Act 47 provides a textbook
11 example of the government's efforts to work with the Board in
12 good faith on new legislation to help the people of Puerto
13 Rico. And the Board has rewarded the government's efforts by
14 reneging on a Board agent's word, accusing a government of
15 being reckless by submitting a well-supported estimate of the
16 financial effects, and misrepresenting the government's
17 efforts to work with the Board.

18 I'd also now like to turn, with Your Honor's
19 permission, to Act 82.

20 THE COURT: Yes.

21 MR. SUSHON: And the Board's argument that Act 82 is
22 an improper reprogramming. The Board is now arguing, Your
23 Honor, that the government cannot, without a reprogramming
24 request, use budgeted resources for the very purpose for which
25 they're budgeted to cover modest additional spending

1 contemplated by a new law.

2 As we showed in our briefs, Your Honor, the Health
3 Department has a budget for fiscal year 2021 totaling more
4 than 74 million dollars. Of that, 61 million dollars is for
5 salaries, six million is for materials and supplies, and
6 nearly six million is for other professional services. By
7 reducing each of these sets of expenditures by a small amount,
8 the government can easily pay the salaries for new employees
9 required to implement Act 82; it can purchase supplies for the
10 new office; and it can employ any professionals whose services
11 may be needed to get that office up and running.

12 The shifting of expenditures within a budget line
13 item is not a reprogramming. That's because money earmarked
14 for salaries is still going to pay salaries. Dollars for
15 supplies are still going to purchase supplies. And the
16 professional services budget is going to be used to pay for
17 professional services.

18 The Board doesn't dispute that meaningfully.
19 Instead, it just says that the government has the burden of
20 demonstrating in -- Act 82 will not require a reprogramming.
21 But that's not the way PROMESA works. It doesn't put the
22 burden on the government to prove that something is not a
23 reprogramming. And because the Board is the one seeking
24 summary judgment on this issue, they bear the evidentiary
25 burden.

1 I'd now like to turn briefly to Act 181, Your Honor.

2 The --

3 THE COURT: Oh, I'm sorry. Just one moment.

4 Ms. Ng, are you still on? Ms. Ng?

5 (No response.)

6 THE COURT: I just got an e-mail from her that says,

7 Amy says P.R. is disconnected.

8 Ms. Walker, are you on from Puerto Rico? Can you

9 hear us?

10 COURT REPORTER: I'm sorry, Your Honor. I believe

11 that e-mail was from earlier when we were disconnected.

12 MS. NG: Yes, Judge. It just came in.

13 THE COURT: Okay. It just came in now. So, fine.

14 So, Mr. Sushon, we will set you for six minutes to go

15 because of these interruptions. So that's a little more than

16 you had on the clock. All right. So we'll restart you at six

17 minutes to go.

18 MR. SUSHON: Thank you very much, Your Honor. I

19 appreciate that.

20 I'd now like to turn to Act 81 briefly, Your Honor.

21 The Board contends that Act 81's estimate is deficient,

22 because it fails to account for the fiscal effects if the new

23 tax won't cover the cost. That's their main concern. But

24 that's a red herring, Your Honor.

25 That's because the Act 81 estimate tells the Board

1 that if the new tax were, in fact, to achieve no revenue, then
2 the worst case scenario that the Board wants to hear so much
3 is that the pay increase will be \$2,809,386.84. That
4 represents only approximately .012 percent of the
5 Commonwealth's total expenditures. And the actual amount at
6 issue here is less, Your Honor.

7 Now, it's true that there's been a shortfall in the
8 new tax revenues, but the remaining amount to be paid by the
9 government for the firefighters amounts only to 1,700,000
10 dollars, or a tiny bit more. And that's only .008 percent of
11 the fiscal plan's anticipated expenditures. Under any
12 measure, this can't be significantly consistent with the
13 fiscal plan.

14 Now, this tiny amount also puts to light the Board's
15 argument that Act 81 requires a reprogramming. The Fire
16 Department's payroll budget exceeds 56 million dollars, and
17 there's no reason that the government should not be able to
18 find a way to cover the 1.7 million out of that budgeted
19 amount.

20 Nevertheless, because the Act 181 certification
21 acknowledges that, if the government can't do that, it would
22 seek a reprogramming, the Board has jumped on that and said
23 that this statute is undeniably a reprogramming, but that's
24 not the case. If, in fact, for some reason the government
25 needs to reprogram money to cover the firefighters' increase,

1 | it will go to the Board and request that funding. And if that
2 | funding isn't forthcoming, Your Honor, the government is not
3 | going to pay the increase. It will have to roll it back.

4 | But unless the government has the flexibility to try
5 | to cover new costs within budgeted resources or else ask the
6 | Board for a reprogramming if one becomes necessary, the
7 | government is essentially going to be unable to function. We
8 | have all sorts of things that come up during the course of a
9 | fiscal year, Your Honor. And we've seen many of them in
10 | Puerto Rico during the time that we've been working together
11 | on these cases.

12 | We've seen Category 5 hurricanes, earthquakes, and
13 | the coronavirus pandemic, to name just three. And if the
14 | government doesn't have flexibility to try to deal with those
15 | things, as long as it's not significantly inconsistent with
16 | the fiscal plan, then it will be completely ineffective. This
17 | is why Congress gave us a flexible framework in PROMESA. It
18 | allows the government breathing room to do what's necessary,
19 | but adds the protections in Section 204(c)'s reprogramming
20 | prohibition, and the Board's power under 203 to reduce
21 | non-debt expenditures to ensure that fiscal responsibility
22 | remains paramount.

23 | The Board --

24 | THE COURT: Mr. Sushon.

25 | MR. SUSHON: Yes, Your Honor.

1 THE COURT: I'm sorry. May I stop you here? We're
2 not talking about hurricanes here. The Board says that the
3 fiscal plan included a specific funded raise for the
4 firefighters. The government apparently decided there should
5 be a bigger raise for the firefighters and there should be a
6 new revenue source that also isn't contemplated by the fiscal
7 plan, to the extent that fiscal plans and revenue neutrality
8 and compliance with the fiscal plan and the policy choices in
9 the fiscal plans are tools that the Board deems necessary to
10 restore fiscal responsibility, et cetera.

11 Why is it that the notion that a statute that changes
12 the compensation arrangement for firefighters from what's
13 provided in the fiscal plan is significantly inconsistent with
14 the fiscal plan?

15 MR. SUSHON: Well, Your Honor, we go back to the very
16 small amount of money that's at issue here, which again is at
17 most .012 percent of the government's overall fiscal plan. By
18 any measure, that can't be significantly inconsistent with the
19 fiscal plan.

20 Now, the government has to have some flexibility to
21 make policy choices, and if it's one that only affects the
22 fiscal plan in the amount of .012 percent, and the government
23 can find a way to pay for it within budgeted line items that
24 are earmarked for the same purpose, the firefighters' pay,
25 then the government should have that flexibility. And PROMESA

1 provides that flexibility, Your Honor.

2 Now, merely acknowledging the possibility that that
3 won't happen, and telling the Oversight Board, in that case,
4 we're going to comply with PROMESA and come to you for a
5 reprogramming, and saying that if the reprogramming doesn't
6 happen, the government is going to stop paying the increase is
7 exactly the kind of thing that PROMESA contemplates, Your
8 Honor.

9 We're not flouting PROMESA. We're complying with
10 PROMESA in every way, and trying to reassure the Board that
11 that's what we're going to do. But the Board sees us on that
12 as some kind of a vice, and this is just not helpful for the
13 power sharing arrangement. It creates a negative dynamic,
14 and, you know, it creates frustration on both sides, if that's
15 the way that the Board is going to treat these things.

16 The bottom line is that this is a law that is not
17 significantly inconsistent with the fiscal plan, and as of
18 right now, does not require reprogramming. And the Board has
19 consistently over the years now told the government it's okay
20 to pass new laws that cost more so long as you offset them
21 with some kind of new revenue or some kind of other cost cut.

22 (Sound played.)

23 MR. SUSHON: And the government has tried to do that
24 here, Your Honor, by saying it was going to pass a new tax.
25 And the Board has told the government that, well, you can't do

1 that either, because even passing a new tax to cover a new
2 expense is a reprogramming.

3 So with that, Your Honor, again, the Board here is
4 trying to eradicate Section 204(a)'s significantly
5 inconsistent standard, and it still hasn't explained how it
6 has the power to do that when it's trying to basically amend
7 the statute that was passed by Congress. After arguing
8 consistently for years that the government can enact laws
9 requiring new expenditures as long as they're offset by new
10 revenue streams, the Board is now arguing that new taxes are
11 impermissible reprogramming.

12 And even where the government is trying to use
13 budgeted resources for their budgeted purposes in support of a
14 new law, the Board is crying foul. And the Board is
15 disclaiming any obligation under PROMESA or the Federal Rules
16 to support its conclusions with evidence of any kind. This is
17 why we need the Court to intervene here and tell the parties
18 what rules govern.

19 We need the Court to make clear that the Oversight
20 Board, just like the government, must discharge its Section
21 204(a) duties in good faith, including by supporting its
22 claims with evidence. The Court needs to make clear that the
23 Board cannot rewrite PROMESA to eliminate the significant
24 inconsistency standard and explain that de minimis deviations
25 from the fiscal plan, such as those presented by these five

1 | laws, are not significant.

2 | And the Court needs to make clear that the government
3 | has the power to use budgeted monies for their budgeted
4 | purposes even if the expenditures are in support of newly
5 | enacted laws.

6 | THE COURT: Thank you.

7 | MR. SUSHON: Unless the Court has any questions, Your
8 | Honor, I'll defer to Ms. Covucci.

9 | THE COURT: Thank you very much, Mr. Sushon.

10 | Ms. Covucci.

11 | MR. SUSHON: Thank you very much, Your Honor.

12 | MS. COVUCCI: Thank you, Your Honor. Thank you, Your
13 | Honor.

14 | THE COURT: Thank you.

15 | MS. COVUCCI: Angela Covucci from O'Melveny & Myers
16 | for AAFAF and the Governor.

17 | I'll start with the *PHC* case, which counsel attempted
18 | to distinguish by saying that there are some factual
19 | differences, but the Board doesn't dispute that *PHC* recognizes
20 | that parties can file a 56(d) request in the alternative to a
21 | substantive response, just as the government did. And *PHC*
22 | also lays out a very functional framework of the five factors,
23 | which the Board also doesn't dispute.

24 | I'll also note that in *PHC*, there actually had been
25 | slightly more discovery accomplished in the case than here,

1 but the First Circuit still granted the 56(d) request. But
2 similarly, in that case, there had been no discovery -- no
3 depositions taken and only very minimal document discovery,
4 which is still more than we've gotten the chance to do here.

5 The Board's argument on 56(d) essentially boils down
6 to saying that no discovery the government could obtain could
7 possibly affect the outcome of the cross-motion, because the
8 Oversight Board just carries no burden to justify its decision
9 beyond what it has given in the conclusory declaration and by
10 looking at the face of the law.

11 Mr. Sushon has already explained why that isn't the
12 case, so I won't belabor it. But to the extent this Court
13 finds that the Oversight Board has any burden at all, whether
14 that burden is characterized as good faith, the duty not to be
15 arbitrary and capricious, or to support its decision with
16 substantial evidence, the government is entitled to full
17 discovery into that evidence, and it is very likely that that
18 evidence will affect the outcome of the cross-motion. It's
19 also extremely likely that that evidence exists, even though
20 the Oversight Board does not seem to want to provide it.

21 The 56(d) standard requires that the non-movant
22 articulate facts that it expects to uncover in discovery that
23 will affect the outcome of the motion, and one fact that we
24 think has become quite clear through the briefing and at oral
25 argument is that the Oversight Board did not actually rely on

1 Dr. Ellis' opinion at the time it made its decision. And that
2 is the operative time for any determination under either the
3 arbitrary and capricious standard, or the substantial evidence
4 standard.

5 (Sound played.)

6 MS. COVUCCI: In both the Jaresko Declaration and
7 here at our oral argument, the Board has said that the Ellis
8 Declaration -- or, I'm sorry, that the Oversight Board's
9 determination was consistent with and substantiated by the
10 Ellis Declaration, not that the Board actually relied on it.
11 And that is not enough to come up with a post hoc explanation
12 for a decision that's already been made. The government is
13 entitled to discovery about what actually happened and what
14 evidence was before the Board, if the Board is going to carry
15 its summary judgment burden.

16 The Board also can't actually point to the testimony
17 that it claims it relies on for Act 82. That's another fact
18 that we expect can come out in discovery that will be relevant
19 to whether the Board is considering evidence and what that
20 evidence was.

21 Similarly, the Board also has not addressed the
22 government's point that, for Act 47, a representative of the
23 Board told the government, a litigation assistant, that the
24 Board had no problem with the bill that ultimately became Act
25 47 being enacted into law. Something changed along the way.

1 The Oversight Board argues that it has made internal analyses
2 of the laws, and it claims in its reply, pages 32 to 33, that
3 if it produced those internal analyses, they would support the
4 Oversight Board's determinations. But it hasn't done that,
5 and it's trying to prevent the government from obtaining
6 discovery into those exact issues.

7 So, as Mr. Sushon has already explained, the Court
8 should deny the cross-motions as a matter of law if it finds
9 that the Oversight Board is to carry any burden under PROMESA.
10 But if the Court is inclined to place any weight at all on the
11 conclusory declaration --

12 (Sound played.)

13 MS. COVUCCI: May I sum up, Your Honor?

14 THE COURT: Yes, please.

15 MS. COVUCCI: Thank you.

16 If the Court is inclined to place -- to place even
17 the slightest weight on the conclusory declarations that the
18 Oversight Board has put forth, the government is entitled to
19 full discovery and to the evidence or not on which those
20 declarations were based.

21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 And so now we go into the homestretch of the
24 Oversight Board's rebuttal arguments, beginning with
25 Mr. Bienenstock for 12 minutes.

1 MR. BIENENSTOCK: Thank you, Your Honor. Martin
2 Bienenstock from Proskauer Rose, LLP, for the Oversight Board.
3 May it please the Court.

4 Mr. Sushon's first point about not defining
5 significantly inconsistent has several responses. One is that
6 it's probably not a one size fits all. It depends what kind
7 of law is at issue, and what part of the fiscal plan or budget
8 it's inconsistent with.

9 But, in any event, Mr. Sushon admitted during his
10 rebuttal that he -- the government has recognized from the
11 outset that the Board has imposed a revenue neutrality
12 principle about all new legislation, so that basically moots
13 the concept of is something significantly inconsistent.

14 You have to find a way to make new laws, not --
15 taking into account the fiscal plan, the budget, the debt
16 sustainability, et cetera, revenue neutral, for all the
17 reasons I mentioned in my earlier argument. It just upsets
18 everything else that's going on. And we have to look at this
19 as an integral, overall process where everything does affect
20 everything else, so you can't just pull one thing out of
21 kilter.

22 Now, when it comes to 204 --

23 THE COURT: So is it your position --
24 Mr. Bienenstock, so is it your position that something that is
25 not absolutely revenue neutral to whatever degree is by

1 definition significantly inconsistent and, therefore, in
2 violation of 204?

3 MR. BIENENSTOCK: No. I'm not going to that extreme,
4 and that's why I said one size does not fit all. You would
5 have to look at the facts and circumstance and what is the
6 magnitude of the expense. If you're dealing with, for
7 instance, a four billion dollar health budget, a lot less than
8 five percent could be significantly inconsistent. It could be
9 hundreds of millions -- or tens of millions of dollars.

10 If you're looking at insignificant things, you might
11 come up with a totally different answer. So again, as a
12 matter of fact --

13 THE COURT: Mr. Bienenstock, if you could just --

14 MR. BIENENSTOCK: Yes.

15 THE COURT: Mr. Bienenstock, I'm sorry. You cut in
16 and out for me. I missed some words.

17 Ms. Walker, were you able to hear what Mr.
18 Bienenstock was saying?

19 COURT REPORTER: Yes, Your Honor. The last thing I
20 heard from Mr. Bienenstock was --

21 (Whereupon the court reporter read into the record
22 from page 112, line 9, to page 112, line 11.)

23 THE COURT: Okay. Did it mechanically cut off or did
24 it cut off because I interrupted him?

25 COURT REPORTER: For me, Your Honor, it cut off

1 | because you interrupted him.

2 | THE COURT: Okay. I apologize to both of you. For
3 | some reason, in my connection I was dropping some words from
4 | Mr. Bienenstock.

5 | So we'll set the clock back a minute. And,
6 | Mr. Bienenstock, would you just take yourself back 30 seconds
7 | or so and tell me the last two points that you were making,
8 | because I missed some of the words. Sorry.

9 | MR. BIENENSTOCK: Sure. I was saying that one of the
10 | reasons why I said earlier that one size does not fit all for
11 | this is you have to look at the facts and circumstances. A
12 | tiny budget item is one thing. If you're dealing with health
13 | care, you can't say because it's a four billion dollar annual
14 | expense, you're entitled to vary from it by five percent,
15 | because that's a huge amount of money.

16 | So it depends on the circumstance. And that's why
17 | one size does not fit all. And Mr. Sushon admitted that he
18 | knows we've had a revenue neutrality policy, but again, it's
19 | applied with the rule of reason.

20 | Mr. Sushon's next point was he parsed the difference
21 | between a dictionary definition of expenditure and expense for
22 | purposes of 204(a)(2). It's ironic that the government
23 | totally reads out of that statute the expertise involved, the
24 | impact, as opposed to the facial, superficial instruction of
25 | the statute, but when it comes to the word "expenditures,"

1 they're trying to make a distinction between expenditures and
2 expense.

3 The bottom line is there is no distinction. If we're
4 trying to get savings -- well, first, he defined expenditures,
5 and his definition was, payment for a result. Well, okay.
6 The payroll is for the result of the quantity of services
7 we've been receiving, and the Law 138 -- 176 now changes that
8 to reduce the services we're receiving by five percent. And
9 so even using his definitions, it doesn't save the fact that
10 176 just increases expense or expenditures without any
11 authorization, and gets in the way of the right-sizing that's
12 part of the fiscal plan.

13 Mr. Sushon resisted mightily the notion that there
14 could be any consequence for the government proceeding with a
15 law that the Board has determined impairs or defeats PROMESA
16 purposes before the -- there's an evidentiary hearing at the
17 Court's request. That creates two mammoth problems. The
18 first is it's totally contrary to the words of 108(a)(2). And
19 the second is it puts a very unfair burden on the Court and
20 the Board to run to court. They should just obey the law as
21 it's written.

22 Now, when it gets to evidence, the government totally
23 overlooks 108(a)(1), which provides that the Governor and
24 legislature may not supervise or review the activities,
25 conduct of the Board and its members. Now, I would say that

1 of course in court, the matter is the Court reviewing, but at
2 the instance of the government. But at a minimum, 108(a)(1)
3 shows how much deference Congress intended to give to the
4 Oversight Board in saying the government and legislature
5 cannot review it, and 108(a)(2) is based on determinations
6 made by the Board.

7 And when it gets to 108(a)(2), Your Honor, that is a
8 legal determination of purposes of PROMESA. So the Board only
9 wants to do the right thing, and is rational, and it always
10 has reasons for things it's doing. But it's not as if the
11 government gets to second guess what the Board decides as a
12 legal matter is a purpose of PROMESA.

13 On the issue of federal funds, Your Honor, I wanted
14 to correct something I said earlier that -- I said earlier
15 mistakenly that Medicaid preempts all P.R. law. I was
16 referring in my mind to the Ellis Declaration at paragraph 31,
17 and it doesn't refer to Medicaid. It says, quote, Medicare
18 Advantage plans are exempt from Act 138 due to the federal
19 preemption of most state level regulations governing health
20 plans. So I'm sorry that I misspoke Medicaid for Medicare
21 Advantage, but that's what I was referring to earlier.

22 The bottom line is that neither for Act 138 or 176
23 did the government's certificate get close to being a formal
24 estimate. It shows no financial expertise, no impact. In one
25 case, it's barely a line long. Both cases show they were not

1 prepared by financial -- with financial acumen. They were
2 prepared by legal beagling. And so the notion that anything
3 gets past that is that -- they haven't shown a way where they
4 can get past that hurdle.

5 There was just one other point I wanted to make, Your
6 Honor. I just have to review my notes for a second. I guess
7 the last point is that when it comes to whether the government
8 is entitled to continue implementing both Acts 138 and 176,
9 the fact is that every day they continue doing it, they create
10 more harm. And the process, the actual analysis of a real
11 formal estimate has not been allowed to proceed.

12 And the point I was searching for was this.
13 Mr. Sushon referred to all of these models that somehow
14 underlie the certificates the government has been giving the
15 Board under 204(a)(2). Your Honor, one only has to look at
16 the certificates for Acts 138 and 176 to know that they are
17 not the product of any model, any spreadsheet, any financial
18 analysis whatsoever. They are the product of someone --

19 (Sound played.)

20 MR. BIENENSTOCK: -- deciding that the statute didn't
21 say write a check, and, therefore, they can't have any impact.
22 And I think that really ends the matter for those two issues.

23 And unless the Court has any questions, I'm finished,
24 Your Honor.

25 THE COURT: Thank you, Mr. Bienenstock. I don't have

1 any further questions for you.

2 And so we will turn to Mr. Mungovan.

3 MR. MUNGOVAN: Good afternoon, Your Honor. Timothy
4 Mungovan again for the Oversight Board, and I will address
5 again Acts 47, 82, and 181.

6 Let me start with the revenue neutrality issue first.
7 The Board does not -- excuse me. The Court does not need to
8 find that the laws violate a revenue neutrality provision in
9 the fiscal plan in order to determine that the government's
10 certification that the laws are not significantly inconsistent
11 with the fiscal plan is erroneous. So we don't need fiscal
12 neutrality on any of these three laws.

13 Let me explain. So even Mr. Sushon says that 25
14 million dollars with respect to Act 47 is a lot of money. And
15 the Board contends that if you accept the 25 million, and it
16 could be as much as 40 million according to the government's
17 own certification or estimate, that is a number that on any
18 measure is significantly inconsistent with the fiscal plan,
19 particularly if you stack that up over a five-year period.

20 We're talking about something that could exceed 100
21 million dollars. And I would be willing to venture that many
22 of the stakeholders, with respect to Puerto Rico and the
23 finances of Puerto Rico, would agree that a hundred million
24 dollars plus over a five-year period is significantly
25 inconsistent with the fiscal plan for the Commonwealth.

1 With respect to Act 82, Act 82 is defective, and it
2 reads -- specifically, the estimate is defective, because the
3 estimate covers only one year, as I indicated in my opening
4 remarks. And Act 82, on its face, because it only covers one
5 year, it fails to satisfy the requirement that this Court
6 found as part of Law 29, that an estimate must take into
7 consideration the impact for the entirety of the fiscal plan
8 period, which this certificate and estimate does not do.
9 There's also evidence, albeit it arguable, that the act will
10 increase costs for the Commonwealth, and, specifically, in the
11 amount of 25 million dollars, which I will return to once I
12 finish this point about revenue neutrality.

13 And then, thirdly, with respect to Act 181, Act 181
14 is directly inconsistent with the 2019 Fiscal Plan, and let me
15 be more specific on that. The Governor's certification at Act
16 181 is not significantly inconsistent with the fiscal plan.
17 It is erroneous, because the 1,500 dollars annual increase is
18 not included in the 2019 Fiscal Plan.

19 It is undisputed that the 2019 Fiscal Plan provided
20 funding to increase firefighters' salaries by 500 dollars
21 annually, and that's Hearing Exhibit 55, at page 99, and the
22 Government's Response to the Statement of Uncontested Facts,
23 at paragraph 43. So there's no need for revenue neutrality
24 analysis around Act 181.

25 Specifically, with respect to revenue neutrality for

1 both Acts 181 --

2 THE COURT: Before you go on to revenue --

3 MR. MUNGOVAN: Yes, Your Honor.

4 THE COURT: I'm sorry, Mr. Mungovan. Before you go
5 on to revenue neutrality, I think the argument I last heard
6 about 181 is that the -- yes, the fiscal plan has a specific
7 compensation increase for firefighters, but the government
8 needs to have -- needs to have flexibility to make a different
9 policy decision about how much to compensate firefighters,
10 especially if, at the end of the day, it doesn't cost that
11 much. Therefore, it's not a significant inconsistency.

12 What does the Board say to that?

13 MR. MUNGOVAN: Well, what I would say, Your Honor, is
14 with respect to what is the significant inconsistency and what
15 is not, as Mr. Bienenstock said, it's not one size fits all,
16 but I will point out that there are core points, core points
17 in the fiscal plan, and among them is growth. And one of the
18 concerns that is implicit throughout the fiscal plan is a
19 question around spending on head count and spending on
20 salaries, as opposed to capital expenditures.

21 And so expenditures that promote growth are the types
22 of things that the Board could hypothetically say are not
23 significantly inconsistent with the fiscal plan, even though
24 they're not expressly provided for in the fiscal plan, and
25 even though there may not be a funding mechanism that is

1 provided for them. It's the capital expenditures that promote
2 growth for infrastructure and the like.

3 Here, this type of salary increase, where the Board
4 has already provided for a salary increase, is just the type
5 of thing that does not necessarily promote growth. And while
6 the Board recognizes, I would say implicitly, the
7 extraordinary sacrifices of the firefighters and, frankly, all
8 first responders, as is set forth throughout the fiscal plan,
9 at the same time, this type of expenditure is not necessarily
10 contributing to the growth of the economy of the Commonwealth.
11 And, therefore, it could be reasonably deemed to be
12 significantly inconsistent with the fiscal plan, especially
13 because the fiscal plan does not provide for a 1,500 dollars
14 annual increase. It provides for a 500 dollars annual
15 increase.

16 THE COURT: Thank you.

17 MR. MUNGOVAN: But I will say, Your Honor, with
18 respect to Act 181 and Act 47, those are tax driven acts in
19 that the funding mechanism for Act 181 is a tax. And Act 47
20 is a tax incentive act in order to, as Mr. Sushon stated,
21 retain medical professionals on the island of Puerto Rico. I
22 would say that those two particular acts are directly
23 inconsistent with a specific provision in the fiscal plan.

24 And I mentioned it earlier, but I will read it now.
25 This is on page 124 of the 2019 Fiscal Plan at subsection

1 14.3.3. And it states, Puerto Rico needs to drive towards
2 more formality and increased compliance within the tax base,
3 but it cannot lose revenues in the process. Therefore, any
4 tax reform or tax law initiatives that the government
5 undertakes or pursues during a year, within the 2019 Fiscal
6 Plan period, must be revenue neutral. That is, all tax
7 reductions must be accompanied by specific offset and revenue
8 measures of a sufficient amount identified in the enabling
9 legislation.

10 So this isn't just a generic revenue neutrality here
11 with respect to Act 181 or Act 47 that is being invoked and
12 that these two acts are inconsistent with. It is a very
13 specific provision which we cited in our brief and referenced
14 in our brief that these acts are inconsistent with. And that
15 ties directly to the tax aspect of these acts and the effect
16 that they will have.

17 I just want to mention a couple of additional points,
18 Your Honor, if I may.

19 THE COURT: Yes.

20 MR. MUNGOVAN: With respect to Act 47, we heard quite
21 strong language from counsel to the government with respect to
22 what was characterized as the Board's agent reneging on a
23 discussion around whether the Board has or does not have a
24 problem or did not have a problem with Act 47 in its
25 preenactment phases. And putting aside the evidentiary

1 | issues, and putting aside the emotion of it, I would simply
2 | point out that this type of circumstance is expressly provided
3 | and addressed in PROMESA itself. And that is at,
4 | specifically, Section 204(a)(6).

5 | And to avoid any confusion, and maybe further
6 | discussion around it, I will simply read the relevant portion.
7 | What it says is, "preliminary review of proposed acts" --
8 | which is exactly what we're talking about here based on the
9 | evidence that the government has submitted.

10 | "At the request of the legislature, the Oversight
11 | Board may conduct a preliminary review of proposed legislation
12 | before the legislature to determine whether the legislation as
13 | proposed would be consistent with the applicable fiscal plan
14 | under this subtitle, except that any such preliminary review
15 | shall not be binding on the Oversight Board in reviewing any
16 | law subsequently submitted under this subsection."

17 | So this really doesn't have anything to do with the
18 | operative relationship between the Board and the government
19 | with respect to discussing legislation. And even assuming,
20 | for the sake of argument, that a statement that there was --
21 | the Board had no problem with the bill in its form at the
22 | time, it is beside the point. That evidence is irrelevant to
23 | the question of whether or not the government has complied
24 | with Section 204(a) of PROMESA.

25 | And then the last point that I would like to make,

1 Your Honor, is with respect to Act 82. And I had indicated to
2 you that I recalled reading last night that section of the Act
3 that addressed this issue of -- apparently this issue of the
4 testimony and the potential cost of the act. And I would -- I
5 would direct the Court to the act itself.

6 And I'm just bringing up the precise section and
7 exhibit number. I believe, Your Honor, it is Hearing Exhibit
8 80 -- excuse me, Hearing Exhibit 10 for Act 82, which is the
9 certified English translation of the act. And then I'm
10 looking specifically at page five of the act, using the
11 internal page numbering of the act itself. And using the ECF
12 docket numbering system, it's page six of 34. This is
13 docket --

14 THE COURT: Yes. I have it here.

15 MR. MUNGOVAN: This is document no. 18-1. The first
16 paragraph is the paragraph that I was referring to. And it
17 may not be specifically responsive to the Court's question,
18 but I wanted to highlight it for you. It states, it has been
19 mentioned that the implementation of a regulatory office may
20 have a potential fiscal impact of approximately 25 million
21 dollars. In what pertains to this statement, we must argue
22 that these amounts are not supported by any empirical data
23 whatsoever. For such reason, it would be irresponsible for
24 this legislative assembly to approve these unfounded
25 allegations in a study when the lives and health of thousands

1 of patients are on the line. Moreover, the economic aspects
2 cannot and should not be above the preservation of human
3 lives.

4 So, again, Your Honor, it's not entirely responsive,
5 and I don't have the testimony at hand, or whatever submission
6 was made, and I will locate that and submit it to the Court if
7 the Court is willing to accept it.

8 It appears, however, that there was some evidence
9 admitted as part of the legislative history and the
10 negotiation of this particular act that suggested that the act
11 could have a cost of 25 million dollars, which is consistent
12 with the Board's letters to the Commonwealth Government with
13 respect to this particular act, and informs, in part, the
14 concerns that the Board had with respect to the government's
15 estimate of the act's impact on the expenditures of the
16 Commonwealth.

17 THE COURT: Yes. You may submit specific information
18 about the statements supplementally, but promptly.

19 MR. MUNGOVAN: Thank you, Your Honor. We will do so.

20 Unless the Court has further questions, I do not have
21 other arguments or points that I would like to make.

22 THE COURT: Thank you. I have no further questions.

23 The Court reserves decision on these motions and will
24 rule as promptly as possible.

25 I thank you all for these very well prepared,

1 thoughtful, thorough, and helpful oral arguments. This
2 concludes today's hearing. The next scheduled hearing date is
3 the December Omnibus Hearing, which is scheduled for December
4 9th, 2020. That hearing will occur telephonically as well,
5 and the Court will issue a procedures order providing the
6 logistical details closer to the date of that hearing.

7 Is there anything further that we need to take up
8 this afternoon, Counsel? I'll wait 30 seconds for anyone to
9 unmute who wants to say something.

10 (No response.)

11 THE COURT: Okay. I'm cheating you and stopping at
12 20 seconds, because it doesn't sound like anyone is going to
13 offer anything.

14 So, as always, I thank the court staff in Puerto
15 Rico, Boston and New York for their work with us in supporting
16 these matters. I wish you all good holidays, safety, and good
17 health.

18 We are adjourned. Thank you. Good afternoon.

19 (At 1:58 PM, proceedings concluded.)

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1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3

4 I certify that this transcript consisting of 126 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge Laura Taylor Swain, and the
8 Honorable United States Magistrate Judge Judith Gail Dein on
9 November 24, 2020.

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13 S/ Amy Walker

14 Amy Walker, CSR 3799

15 Official Court Reporter

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